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ABSTRACT

In this monograph, data is analyzed to determine whether public tax funds can be used legally to support religious elementary and secondary schools. The authors investigate the history of church-State relations, the provisions of Federal and State constitutions and statutes, and Federal court decisions concerning public aid to religious schools. The content focuses on (1) the rise of Catholic religious education in America, (2) the theories and controversies surrounding parochial school aid, (3) Federal and State provisions for the separation of church and State, (4) Federal and State provisions permitting the use of public funds for religious schools, and (5) an analysis of Federal Court decisions. Appendixes list Federal and State provisions both prohibiting and permitting use of public funds for religious schools. A substantial bibliography subdivided by literature type concludes the document. (Author/JF)

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The following monographs constitute the second series of State-of-the-Knowledge papers jointly sponsored by the ERIC Clearinghouse on Educational Management and the National Organization on Legal Problems of Education. Eight monographs have been commissioned in this series, which will be designated as the *Legal Aspects of School Administration Series:*

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Church-State Relations: The Legality of Using Public Funds For Religious Schools

MICHAEL R. SMITH

JOSEPH E. BRYSON

1972

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ERIC/CEM State-of-the-Knowledge Series, Number Twenty-two
NOLPE Monograph Series
on
Legal Aspects of School Administration
Number One

FOREWORD

This monograph by Michael R. Smith and Joseph E. Bryson is one of a series of state-of-the-knowledge papers on the legal aspects of school administration. The papers were prepared through a cooperative arrangement between the ERIC Clearinghouse on Educational Management and the National Organization on Legal Problems of Education (NOLPE). Under this arrangement, the Clearinghouse provided the guidelines for the organization of the papers, commissioned the authors, and edited the papers for content and style. NOLPE selected the topics and authors for the papers and is publishing them as part of a monograph series.

Wielding a large amount of data, Dr. Smith and Dr. Bryson seek to determine whether public tax funds can legally be used to support religious elementary and secondary schools in this country. The authors analyze the history of church-state relations, the provisions of federal and state constitutions and statutes, and the decisions of federal court cases concerning public aid to religious schools.

Dr. Smith is an assistant professor of education at Pfeiffer College in North Carolina. He holds bachelor's and master's degrees from Appalachian State University. In 1971 he received his doctor's degree from the University of North Carolina at Greensboro, having written his dissertation on the legality of using public funds for religious schools as interpreted by federal court decisions.

Dr. Bryson is director of the Extension Division and an associate professor of education at the University of North Carolina at Greensboro. Specializing in philosophy of education and school law, Dr. Bryson has written numerous publications, including a book on loyalty requirements for public school teachers. He received his bachelor's degree from Elon College in 1952, his master's degree from the University of North Carolina at Greensboro in 1957, and his doctor's degree from Duke University in 1960.

PHILIP K. PIELE, Director
ERIC Clearinghouse
on Educational Management

MARION A. MCGHEHEY,
Executive Secretary
NOLPE

PREFACE

The purpose of this study is to determine the legality of using public tax funds to support religious elementary and secondary schools in the fifty states through analysis of federal court decisions, constitutional and statutory provisions, and the historical relationship between selected religions and governments that support our laws.

The presentation is factual and deals with a legal question. No attempt was made to relate this question to social or economic factors in spite of their importance to society's eventual decision on this question.

Data were obtained by a variety of methods, which varied with each chapter. Chapters 1 and 2 are based on historical research derived from pertinent books, encyclopedias, and historical documents.

Chapter 3 entailed a thorough study of both federal and state constitutional and statutory provisions related to the separation of church and state. The data are presented on a continuum ranging from general prohibitions against involvement of church and state to specific bans against use of public funds to support sectarian schools. Codes to all provisions for chapter 3 are included in Appendix A.

Chapter 4 required a complete study of federal and state constitutional and statutory provisions permitting the use of public funds for religious schools. All codes relative to chapter 4 are included in Appendix B.

For chapter 5, a complete listing of all federal court cases dealing with the use of public funds for the support of religious schools or religious activities in public schools was secured with the assistance of the *American Digest System, National Reporter System, American Law Reports, Corpus Juris Secundum,* and other legal indexes. Each case was thoroughly read with a view toward its relationship to this work, and, if relevant, is reported.

This paper is limited to questioning the legality of extending public tax support to elementary and secondary religious schools. None of the court cases deals specifically with colleges and universities, though the influence of the cases may well extend there.

Also, some of the cases deal with the legality of religious practices in public schools rather than with the question of extending public aid to religious schools. These cases are included because

they face the question whether public funds and facilities may be used to support religious activities. Courts have treated the two issues as inseparable; any one of the cases may have been the foundation for another.

Finally, the reporting of all public documents and legal and historical materials is limited by our interpretation and selective judgment.

ERIC and ERIC/CEM

The Educational Resources Information Center (ERIC) is a national information system operated by the United States Office of Education. ERIC serves the educational community by disseminating educational research results and other resource information that can be used in developing more effective educational programs.

The ERIC Clearinghouse on Educational Management, one of twenty such units in the system, was established at the University of Oregon in 1966. The Clearinghouse and its nineteen companion units process research reports and journal articles for announcement in ERIC's index and abstract bulletins.

Research reports are announced in *Research in Education (RIE),* available in many libraries and by subscription for $21 a year from the United States Government Printing Office, Washington, D.C. 20402. Most of the documents listed in *RIE* can be purchased through the ERIC Document Reproduction Service, operated by Leasco Information Products, Inc.

Journal articles are announced in *Current Index to Journals in Education. CIJE* is also available in many libraries and can be ordered for $39 a year from CCM Information Corporation, 909 Third Avenue, New York, New York 10022. Annual and semiannual cumulations can be ordered separately.

Besides processing documents and journal articles, the Clearinghouse has another major function—information analysis and synthesis. The Clearinghouse prepares bibliographies, literature reviews, state-of-the-knowledge papers, and other interpretive research studies on topics in its educational area.

NOLPE

The National Organization on Legal Problems of Education (NOLPE) was organized in 1954 to provide an avenue for the study of school law problems. NOLPE does not take official positions on any policy questions, does not lobby either for or against any position on school law questions, nor does it attempt in other ways to influence the direction of legislative policy with respect to public education. Rather it is a forum through which individuals interested in school law can study the legal issues involved in the operation of schools.

The membership of NOLPE represents a wide variety of viewpoints—school board attorneys, professors of educational administration, professors of law, state officials, local school administrators, executives and legal counsel for education-related organizations.

Other publications of NOLPE include the NOLPE SCHOOL LAW REPORTER, NOLPE NOTES, NOLPE SCHOOL LAW JOURNAL, YEARBOOK OF SCHOOL LAW, and the ANNUAL CONVENTION REPORT.

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CHURCH-STATE RELATIONS: THE LEGALITY OF USING PUBLIC FUNDS FOR RELIGIOUS SCHOOLS

*Michael Robert Smith

**Joseph E. Bryson

1. INTRODUCTION

Our forefathers sought asylum in America from a Europe buzzing with religious ferment. As the sixteenth century and Elizabeth's reign were drawing toward a close, the Puritan movement was in full bloom.

The American colonists sought a country where they could worship according to the dictates of their consciences, a country unstained by state-established religions. However, in spite of their religious convictions, the first colonists were Englishmen, their king was English, their church was English, and the church held that mere distance should not alter its special position.

Taxation for the support of the church was to go on as usual. That was the king's law and, though unpopular, it remained in force until 1758 when, under the pressure of a severe economy, the Virginia assembly temporarily annulled it. Cut off from their incomes, colonial parsons appealed to the king, who overturned the assembly's act and thus freed the way for the parsons to seek redress in the courts.

Acting in the capacity of defense attorney for the assembly, a young lawyer named Patrick Henry uttered a line of reasoning destined to affect forever the relationship between the church and state in America. Henry avowed:

> . . . that the Act of 1758 had every characteristic of a good law; . . . that a King, by disallowing acts of this salutary nature, from being the father of his people, degenerated into a tyrant, and forfeits all right to his subjects' obedience.
>
> . . . that the only use of an established church and clergy in society, is

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> to enforce obedience to civil sanctions . . . that when a clergy ceases to answer these ends, the community have no further need of their ministry, and may justly strip them of their appointments; that the clergy of Virginia, in this particular instance of their refusing to acquiesce in the law in question, had been so far from answering, that they had most notoriously counteracted, those great ends of their institution; that . . . instead of countenance, and protection and damages, [the clergy] very justly deserved to be punished with signal severity.[1]

After a deliberation of only five minutes, the jury decided in favor of the parson who acted as plaintiff and awarded him one penny in damages. On the basis of this celebrated case, Patrick Henry attained fame as a champion of religious freedom. It was he who authored the Sixteenth Article of the Virginia Bill of Rights, which reads:

> . . . that religion, or the duty we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, and not by force or violence; and, therefore, that all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless, under color of religion, any man disturb the peace, the happiness, or the safety of society; and that it is the mutual duty of all to practise Christian forbearance, love, and charity towards each other.[2]

That article represented more than mere words; it meant that the authority of government now stood for the separation of church and state.

In succeeding years, both Madison and Jefferson also stressed the concepts of voluntariness in matters of conscience and the extragovernmental nature of religion. There can be little doubt that their work and the prevailing public sentiment heavily influenced the opening words of the United States Bill of Rights: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[3]

The Fourteenth Amendment, which states in part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," is now generally considered to bind the states by the guarantees found in the Bill of Rights. However, regarding religion, there is much evidence to suggest that the Thirty-ninth Congress had no such idea in mind. Seven years after enactment of the Fourteenth Amendment, Representative Blaine, who had served as a member of the Thirty-ninth

[1]Moses C. Tyler, *Patrick Henry, American Statesmen* (Boston: Houghton Mifflin Co., 1887), III, p. 53.
[2]*Ibid.*, pp. 208-209.
[3]*United States Constitution*, Amendment I.

Congress, drew wide discussion by introducing a bill for the express purpose of making the religious provisions of the First Amendment binding on the states.

The Blaine Amendment was defeated, but not because it was made unnecessary by the Fourteenth Amendment. Rather, it was not strict enough in prohibiting the use of tax funds for the support of denominational schools.[4] At the time of the Blaine Amendment, the concept of public schools had just become established, and restriction of tax support to these schools was emerging as one of the leading foci of the church and state issue. In 1876 President Grant aptly foreshadowed the direction of this controversy when he said:

> Encourage free schools and resolve that not one dollar of the money appropriated to their support shall be appropriated to the support of any sectarian school; that neither the state or nation, nor both combined, shall support institutions of learning other than those sufficient to afford to every child in the land the opportunity of a good common-school education, unmixed with sectarian, pagan, or atheistical dogma.
>
> Leave the matter of religion to the family altar, the church, and private schools entirely supported by private contributions. Keep the church and state forever separate.[5]

Birth of Catholic Schools

President Grant's remarks may have been prompted by events of the recent past. Immigration had been heavy, and the states had experienced an influx of diverse denominations. Controversies had arisen over which religion was to be taught in the schools, and the solution in most states was to make the schools nonsectarian. This course had met with the disfavor of all religions, and many—Protestant and Catholic alike—had attempted to establish their own schools. By the date of Grant's statement, however, only the Lutheran Protestant school survived in any strength. Indeed, there was little reason for it to continue since the "nonsectarian" schools used the King James version of the Bible, sang Protestant hymns, and thus, were in reality Protestant. But Catholics, who saw public schools as "neutral" against Catholicism found incentive to maintain their parochial schools.

At first, bishops merely urged each parish to establish a denominational school. However, in 1884 when the Third Plenary Council of the church hierarchy met in Baltimore, "the Church made it

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[4]*Congressional Record*, 44th Cong., 1st Sess., (1876), IV, 5245, 5246, 5562, 5568, 5580-5595.

[5]Rena M. Atchison, *Un-American Immigration: Its Present Effects and Future Perils* (Chicago: no publisher given, 1894), pp. 90-91.

obligatory for each parish to set up its own school and for each Catholic to send his children to a parochial school."[6] "The announced goal of the bishops [was], 'every Catholic child in a Catholic schools'."[7] Two of the resolutions adopted by the Council read:

> 1. That near every Church a parish school, where one does not yet exist, is to be built and maintained in *perpetuum* within two years of the promulgation of this council, unless the bishop should decide that because of serious difficulties a delay may be granted.
> 2. That all Catholic parents are bound to send their children to the parish school unless it is evident that a sufficient training in religion is given either in their own homes, or in other Catholic schools; or when, because of a sufficient reason, approved by the bishop, with all due precautions and safeguards, it is licit to send them to other schools. What constitutes a Catholic school is left to the decision of the bishop.[8]

Therefore, under the threat of discriminatory Protestant schools and under the official pressure of the church, Catholic schools grew. Although the stated goal of the bishops was never realized, within eighty-four years, by 1968, Catholic pupil enrollment represented almost 22 percent of the United States' elementary and secondary school-age population. Of all nonpublic elementary and secondary schools, 90 percent were Catholic.[9]

The reason for the birth of Catholic schools is thus moderately clear, but the rationale for their persistence, long after the public schools were truly secularized, is not immediately apparent. Organizational inertia or a reluctance to disband that which has already been developed may account for continued existence. "But organizational inertia accounts merely for persistence, not growth and vigor."[10] Some growth and vigor may be attributed to the fact that "the Roman Catholic schools have neither developed into a very expensive type of private education nor provided second-class education for their students."[11] Yet Catholic curricula are mostly college-oriented, and expensive vocational courses are not readily available for noncollege oriented students. Another reason is that "American Catholics are a very religious group, . . . religion is

[6]Peter H. Rossi and Alice S. Rossi, "Some Effects of Parochial School Education in America," in *Society and Education: A Book of Readings*, eds. Robert J. Havighurst, Bernice L. Neugarten, and Jacqueline M. Falk (Boston: Allyn, 1967), p. 205.

[7]Albert C. Koob, "Financial Problems of Parochial Schools," mimeographed (New York: Eleventh National Conference on School Finance, 1968), p. 99.

[8]Reginald A. Neuwien, ed., *Catholic Schools in Action* (South Bend, Indiana: University of Notre Dame Press, 1966), p. 9.

[9]Edd Doerr, "To the Commission to Study State Aid to Nonpublic Education" (Statement delivered on behalf of the American Civil Liberties Union, Baltimore, October 6, 1969).

[10]Andrew M. Greeley and Peter H. Rossi, *The Education of Catholic Americans* (Chicago: Aldine Publishing Co., 1966), p. 4.

[11]*Ibid.*

valued, and . . . religious education is by extension also valued."[12]

Does Catholic Education Equal Religious Education?

The United States Supreme Court has said that "no tax, in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[13] Furthermore, on the subject of laws that would aid religions, the court has said that if either the purpose or primary effect of the enactment "is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution."[14] In concurring with that opinion, Justice William O. Douglas said:

> Financing a church either in its strictly religious activities or in its other activities is equally unconstitutional, as I understand the Establishment Clause. Budgets for one activity may be technically separable from budgets for others. But the institution is an inseparable whole, a living organism, which is strengthened in proselytizing when it is strengthened in any department by contributions from other than its own members. . . . What may not be done directly may not be done indirectly lest the Establishment Clause become a mockery.[15]

Confining the discussion, academically speaking, specifically to the Catholic church, this crucial question emerges: "Is the religious dogma of the Church *intended* to be inseparable from education within Catholic schools?" At least some insight might be gained by determining what Catholics mean when they say *education.* A definition frequently quoted is as follows:

> Education is the deliberate and systematic influence exerted by the mature person upon the immature through instruction, discipline, and the harmonious development of all the powers of the human being, physical, social, intellectual, moral, aesthetic, and spiritual, according to their essential heirarchy, by and for their individual and social uses and directed toward the union of the educand with his Creator as the final end.[16]

Redden and Ryan, authors of a textbook for philosophy of education courses in Catholic colleges and universities, have written, "religious education is the primary function, the *raison d'etre,* of the Catholic school."[17] But does this mean that the Catholic school simply makes available religious education, distinct from secular

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[12]*Ibid.*
[13]Everson v. Board of Education, 330 U.S. 1 (1947).
[14]Abington School District v. Schempp, 374 U.S. 203 (1963).
[15]*Ibid.*
[16]John D. Redden and Francis A. Ryan, *A Catholic Philosophy of Education* (Milwaukee: The Bruce Publishing Co., 1956), pp. 23-24.
[17]*Ibid.*, p. 173.

education? Again, Redden and Ryan: "Religion must, of necessity, permeate all life education. Its teachings constitute the very core and foundation upon which all education for the true, the good, and the beautiful must be founded."[18]

Furthermore, in the words of Joseph H. Fichter, author of *Parochial Schools: A Sociological Study*, "It is a commonplace observation that in the parochial school religion permeates the whole curriculum, and is not confined to a single half-hour period of the day."[19] Fichter partly focused his study on course content and pedagogical methods within Catholic schools. Included among his findings was evidence such as: (1) texts written to emphasize Catholic dogma; (2) history books stressing the contributions of Catholic people; and (3) arithmetic taught in a way to induce pious thoughts, with problems such as: "If it takes forty thousand priests and a hundred and forty thousand sisters to care for forty million Catholics in the United States, how many more priests and sisters will be needed to convert and care for the hundred million non-Catholics in the United States?"[20]

Redden and Ryan have commented that "a religious atmosphere is a vital necessity for religious education."[21] Enumerating what was considered necessary to achieve a religious atmosphere, the authors said:

> . . . recognition must be given to the value and importance of the influences of environment on religious education. These influences include: the presence in the classroom of of the crucifix and religious pictures; the teacher's personality, character, and . . . the practice of religion through prayers, the Mass, the sacraments, good deeds, and the innumerable cultural, aesthetic, and moral practices that flow from the Catholic liturgy.[22]

The authors repeatedly make it clear that by their use of the words *religious education* they mean all education; thus they say that "Catholic religion permeates the entire atmosphere, comprising in truth and fact, the 'core curriculum' around which revolve all secular subjects."[23]

In his study Fichter found an environment true to Redden and Ryan's description; in addition, he recounted the extent of daily religious activities in which students participate. Fichter noted

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18*Ibid.*
19Joseph H. Fichter, *Parochial Schools: A Sociological Study* (South Bend, Indiana: University of Notre Dame Press, 1958), p. 86.
20*Ibid.*
21Redden and Ryan, *Catholic Philosophy*, p. 185.
22*Ibid.*, pp. 185-186.
23*Ibid.*, p. 357.

that attendance at Mass was not compulsory, but for those who came late there was, in one teacher's class, the punishment of writing out the Mass.[24]

The authors mentioned above are recognized national authorities, yet they present only an academic viewpoint, garnered from outside the institution of Catholicism. Perhaps a greater degree of credibility could be gained from the Catholic hierarchy proper.

Present-day spokesmen for Catholic school policy are numerous. Monsignor Donohue, Catholic director of the Division of Elementary and Secondary Education, has advanced the position that "if in accepting aid you have to lean over backwards to exorcise any Christian concepts from the subjects the state will pay for, then we've paid too high a price."[25] And the New York State Council of Catholic School Superintendents has said that "the Catholic school must stand as a unique institution in the community. Its uniqueness must flow from a philosophy of education that is operative in all aspects of school life."[26]

In his 1963 encyclical *Pacem in Terris*, Pope John XXIII said:

> It is indispensable, therefore, that in the training of youth, education should be complete and without interruption: namely, that in the minds of the young, religious values should be cultivated and the moral conscience refined, in a manner to keep pace with the continuous and ever more abundant assimilation of scientific and technical knowledge. And it is indispensable, too, that they be instructed in the proper way to carry out their actual tasks.[27]

In a similar vein, Pope John XXIII's predecessor, Pope Pius XII, in 1955 addressed the teaching sisters, saying that "according to the Catholic concept, the object of the school and education is the formation of the perfect Christian. Your entire school and educational system would be useless were this object not the central point of your labor."[28]

By now there should be no mistake about the place of religious education in Catholic schools; religious education is fundamental, imperative, and the "first cause" of the Catholic educational process.

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[24]Fichter, *Parochial Schools*, pp. 89-92.
[25]William Ryan, "Washington Report," *Catholic School Journal*, 68 (December 1968), 4.
[26]"The State of the Schools," mimeographed (New York: New York State Council of Catholic School Superintendents, September 1, 1969).
[27]Neuwien, *Catholic Schools*, p. 18.
[28]Fichter, *Parochial Schools*, p. 77.

2. AMERICA: THE CHURCH AND STATE SCHOOL QUESTION

"Put away your gods and come and worship ours or we will kill you and your gods."[29] Shades of the sentiment behind Dostoyevsky's exclamation affected greatly the character of both public and religious schools in America. "At the time of the adoption of the Federal Constitution, nine of the American states had established churches, with several denominations represented."[30]

The schools of the time were denominational in character, and the lines of demarcation were not always clear. In certain instances "public funds and other forms of public aid were turned over to private agencies and religious groups for the support of nonpublic education."[31] But the need for education was so great that there was very little strife among the denominations. "People were only too happy to have any kind of school established that would provide young people with the elements of learning.[32]

However, the enjoyment of such harmony was not lasting. "Immigration as well as schisms in established denominations brought about a proliferation of sects, so that by 1840 the separation of church and state had taken place in every state within the Union."[33] Concern over the religious complexion of schools mounted in direct proportion to the arrival of large numbers of Irish and German Catholics. Indeed, many feared the possibility of a papist alliance with European Catholic monarchies to conquer the country and subject it to ecclesiastic rule. Samuel Morse warned, "there is good reason for believing that the despots of Europe are attempting, by the spread of Popery in this country, to subvert its free institutions.[34]

Such an atmosphere made it quite natural for educational statesmen of the time to advocate nondenominational schools:

> The first moves in the direction of secular public education, made in Massachusetts toward the middle of the last century, stemmed from Horace Mann's desire to eliminate from the schools the contradictions be-

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[29]Fyodor Dostoyevsky, *The Brothers Karamazov* (New York: Random House, 1950), p. 301.
[30]Rossi and Rossi, "Effects of Parochial Education," p. 204.
[31]Roald F. Campbell *et al.*, *The Organization and Control of American Schools* (Columbus, Ohio: Charles E. Merrill Publishing Co., 1970), p. 528.
[32]Mary Perkins Ryan, *Are Parochial Schools the Answer?* (New York: Holt, Rinehart and Winston, 1964), p. 32.
[33]Rossi and Rossi, "Effects of Parochial Education," p. 205.
[34]Samuel F. B. Morse, *Foreign Conspiracy Against the Liberties of the United States* (New York: Leavitt, Lord and Co., 1835), p. 51.

tween different Protestant tenets and to substitute a kind of ethical culture with biblical overtones.[35]

"While Mann favored the presence of religious instruction in the schools, he insisted that it include only that body of Christian beliefs which did violence to no one's conscience."[36] Mann declared it was the duty of the school "to give to all so much religious instruction as is compatible with the rights of others and with the genius of our government.[37] But Mann did not stand alone. In 1837, Samuel Lewis, the first superintendent of the common schools of Ohio, supported nondenominationalism in his *First Annual Report* to the Legislature; and Reverend Bushnell of New York published an article saying, "[T]o insist that the state shall teach the rival opinions of sects and risk the loss of all instruction for that would be folly and wickedness together."[38]

By 1840 the nondenominational approach was general in the common schools and, if this did not entirely satisfy the Protestant sects, it was tolerable. The King James version of the Bible was read without comment in the schools. The New York City Board of Education ruled in 1844 "that the Bible without note or comment, at the opening of the schools is not inculcating or practising any religious or sectarian doctrine or tenet of any particular Christian or other religious sect."[39] Protestants could supply their own views and indoctrinate, without fear of a loss of the faithful, in a system of Sunday schools.

But what was tolerable to the Protestant sects was anathema to the Catholics. The King James version of the Bible was not sanctioned by the Catholic church and, therefore, could not represent the word of God. Furthermore, reading the Bible without comment meant that private interpretation was necessary. Catholics, believing that the church alone has the right to interpret the Bible, rejected this practice, which to them smacked of sectarianism. These two unsatisfactory conditions within the public schools presented the Catholics with a dilemma. Either they could leave their children in public schools and jeopardize their faith, or they could provide their own schools. If the latter choice were made, they

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[35]Ryan, *Are Parochial Schools the Answer?*, p. 33.
[36]Vincent P. Lannie, *Public Money and Parochial Education* (Cleveland: The Press of Case Western Reserve University, 1968), p. 2.
[37]Neil G. McCluskey, *Catholic Education in America: A Documentary History* (New York: Columbia University Press, 1964), p. 6.
[38]Lannie, *Public Money*, p. 3.
[39]*Ibid.*, p. 252.

faced the prodigious tasks of securing funds and personnel for their schools.

"By 1840 there were 200 Catholic schools in the country as a whole."[40] But this was not nearly enough to instruct all Catholic children. In Lowell, Massachusetts, "provisions was made for a time for 'Irish' schools, which Catholic children only attended, to be taught by Catholic teachers."[41] The schools were publicly supported: nevertheless, Catholics had the right to use the buildings for religious exercises. But where sympathy for the Catholic predicament was absent, the bishops concentrated their efforts toward neutralizing the public schools to make them more palatable for Catholic students.[42] After realizing the futility of their efforts, the bishops met in Baltimore and called for a "separate system of education for the children of our communion."[43] Advocation of this policy, however, still left the question of how to finance the schools. In Europe, tax credits were granted to reduce the burden on parents of parochial school children. Therefore, it was natural for the Catholics to look to the state in America.

Battle for Parochial Aid

The first significant battle for parochial aid was waged in New York City during the early 1840s. The campaign was conducted under the leadership of Bishop John Hughes. At the time, 20,000 children, primarily Catholic, refused to attend the public schools because of religious objections. Recognizing the seriousness of the situation, Governor Seward urged the reorganization of New York City's school system. Under Seward's plan:

> . . . the existing Catholic schools would become part of the state's common school system—Catholic public schools—even though they retained their private charters and religious affiliation. Public funds would thus be appropriated to finance denominational schools which Catholic children could attend without violating their religious convictions.[44]

It seems doubtful that Seward saw any constitutional objections to his proposal. In any event, Catholic leaders wasted little time before petitioning the city's Common Council for a share of the common school fund. Briefly, the petition emphasized that existing Catholic schools within the city—all supported by congregations—would collapse unless they received financial relief. In ad-

[40]Neuwien, *Catholic Schools*, p. 3.
[41]*Ibid.*, p. 6.
[42]Lannie, *Public Money*, p. 6.
[43]*Ibid.*
[44]*Ibid.*, p. 21.

dition, the petitioners argued that they also contributed through taxes to the common school fund; therefore, they were entitled to a *pro rata* share.

Almost immediately, two other sects, one Jewish and one Presbyterian, set forth their claims:

> If your Honorable Body shall determine to grant thei. (Catholic) request, and thus establish the principle that this fund, though raised by *general tax*, may be appropriated to *church* or *sectarian* schools, then your memorialists respectfully but earnestly contend, that they are entitled to a rateable portion thereof . . . [45]

Strong opposition was advanced by New York's Public School Society; indeed, the society set forth an argument Bishop Hughes never effectively answered. Earlier Hughes had indicated that, should Catholic schools be granted public funds, the schools would naturally exclude religious exercises from the regular school day. The society countered that elimination of religion would make Catholic and public schools one and the same and the need for Catholic schools would be cancelled.

A three-man committee was set up to study issues and to make recommendations to New York City's Board of Assistant Aldermen. After hearing arguments of the Public School Society and assessing recommendations of the committee, the board rejected the Catholics' request, saying that no incorporated religious society had a valid claim for participation in the common school fund. The committee's answer to Catholic claims was sophisticated and weighs heavily still today. The report argued that Catholics:

> . . . are taxed not as members of the Roman Catholic Church, but as citizens of the State of New York; and not for the purposes of religion, but for the support of civil government. . . . Admit the correctness of the (Catholic) claim, that the Common Council of the City, or the Legislature of the State, may rightfully appropriate the Public Money to the purposes of religious instruction of any kind, in any school, and the consequence will be, that the People may be taxed by law, for the support of some one or other of our numerous religious denominations. . . . By granting a portion of the School Fund to one sect, to the exclusion of others, a "preference" is at once created, a 'discrimination' is made, and the object of this great Constitutional guarantee is defeated.[46]

Failing in his efforts to secure public funds, Hughes turned his back on politicians, but he was now more than ever convinced of the necessity for a separate school system. "Let parochial schools

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[45] *Ibid.*, p. 33.
[46] *Ibid.*, pp. 47-48.

be established and maintained everywhere . . . proceed upon the principle that, in this age and country, the school is before the church."[47] Hughes was calling for voluntary efforts; he had no way of knowing that within forty years commitment to a separate system of parochial schools would be official church policy.

In 1884, the Third Plenary Council of Baltimore made it the duty of priests and bishops to erect and maintain Catholic schools, and of parents to educate their children in them. To carry out this directive, various attempts were made to secure state support.

> One of these was the "Poughkeepsie plan," under which the local board of education leased the parochial school buildings from the parish, maintained the buildings, paid the teachers, and had the right of inspection and control. This plan was in operation for some time, but was finally blocked by a school superintendent who objected to the religious habit worn by the teaching Sisters.[48]

A similar plan for reimbursement was adopted in the towns of Stillwater and Faribault, Minnesota. Here the state claimed the right to control the educational process in Catholic schools, but subsequent controversy forced the abandonment of those arrangements.

Despite the lack of success in securing public support, Catholic schools grew to where in 1900 "some 5 percent of the elementary and secondary school students in the country were in Catholic schools. By 1940 the proportion had risen to 7 per cent, [and] in the last twenty-five years the percentage had doubled . . ."[49] During those years the main sources for financing the Catholic schools were "parish support, diocesan support, tuition, fees, contributed services of religious and lay school staff, and fund raising."[50]

Perhaps it is ironic that absence of one of the prime sources of support for Catholic schools—the relatively inexpensive services of teachers—is now leading directly to their demise. Over the past thirty years fewer Catholic men and women have entered teaching orders, and large numbers have returned to lay life.[51] This decrease has meant the addition of increasing numbers of lay teachers. Between 1957 and 1967 "52,000 new lay teachers were

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[47] *Ibid.*, p. 256.
[48] Ryan, *Are Parochial Schools the Answer?*, p. 34.
[49] Greeley and Rossi, *Education of Catholic Americans*, p. 2.
[50] James Michael Lee, ed., *Catholic Education in the Western World* (South Bend, Indiana: University of Notre Dame Press, 1967), p. 279.
[51] Andre L. Daniere and George F. Madaus, "*The Measurement of Alternative Costs of Educating Catholic School Children in Public Schools*" (Unpublished report prepared by the Massachusetts Advisory Council on Education, March 1969).

added—a 168% increase."[52] Although by 1967 only 2 percent of lay teachers in Catholic elementary schools received over $4,500 annually, and only 28 percent of lay Catholic high school teachers received over $5,000 annually, the differences between their salaries and the traditionally free services of religious teachers represent significant increased costs.[53]

In addition to the increased instructional costs are the added costs of improved educational services. As the public schools make improvements, Catholic schools must follow or risk the loss of support from Catholic parents.

> The Catholic schools are caught in a vicious cycle. Failure to attempt to keep abreast with educational changes and parental aspirations for quality education undermines the voluntary financial support to the schools. On the other hand, meeting such legitimate demands increases costs which must be met by tuition or further parish or diocesan expenditures. This in turn adversely affects parents and parishes least able to afford increases in costs.[54]

Ryan recognized this problem in 1963: "[I]t will soon be practically impossible for unaided Catholic efforts to continue to handle the proportion of Catholic young people now being served."[55] In addition to recognizing the financial plight of Catholic schools, Ryan steered the Catholic educational world toward thinking about whether parochial schools should be maintained. Ryan had two premises for her question. First, she questioned whether Catholic schools, increasingly staffed by lay teachers, can fulfill the objective of providing religious education for Catholic children. "Would a Catholic public still wedded to the concept that only religious [*sic*] can really provide a Catholic education welcome or support schools largely staffed by laity?"[56] Second, she asked whether the church should continue to provide the auxiliary service of education while neglecting to pursue effectively its "first and true" objective of providing religious formation to all its members.

> For in trying to provide a total Catholic education for as many of our young people as possible, we have been neglecting to provide anything like adequate *religious* formation for all those not in Catholic schools, and we have been neglecting the religious formation of adults.[57]

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[52]Benton Patterson, "What's Behind the Shutdowns—and What's Ahead," *School Management*, 13 (April 1969), p. 47.
[53]Lee, *Catholic Education*, p. 280.
[54]Daniere and Madaus, "Measurement of Alternative Costs."
[55]Ryan, *Are Parochial Schools the Answer?*, p. 5.
[56]*Ibid.*, p. 172.
[57]*Ibid.*, p. 175.

Not since Bishop Hughes had anyone asked such fundamental questions about the policy of parochial education conducted by the Catholic church in America.

Ryan was not an alarmist: Catholic school administrators are now quick to acknowledge that their schools will be unable to continue unless they receive massive public support. One such administrator has said:

> I do not say this as a plea, but as a simple statement of fact; unless Catholic schools can notably increase revenues from all possible sources, they will be forced to discontinue in increasing numbers, and all American education will be the poorer for it.[58]

Indeed, the trend is toward Catholic school closings. "Between 1963 and 1969, 1,000 Catholic schools closed and enrollment dropped 14 percent—from 5.9 to 4.8 million."[59] Another author has said Catholic school enrollments decreased by a half-million from 1967 to 1969.[60]

In terms of cost, it has recently been estimated that "if all the private schools in New Mexico closed, the public school systems' expenditures would increase by $18 million."[61] If all private schools in Illinois closed, the added cost to the taxpayers "would be at least $330 million annually. In addition it would cost in excess of $1.5 billion in capital outlays to pay for the classrooms needed to house these 450,000 students."[62] The estimated annual cost to Connecticut, "should the Catholic schools close, is $70,000,000."[63] According to another estimate, if Catholic schools in Detroit, Michigan, closed, the cost of education in that city would increase by more than $111 million a year.[64]

The governor of Illinois, speaking of current transfers of nonpublic students to public schools, has said, "we can establish that the direct cost of student transfers is more than $40 million a year to Illinois taxpayers."[65] In 1968-69, "25,069 students left the Catholic schools in New York State . . .[they were absorbed] into the New York Public Schools at an estimated $1,140 per-pupil expendi-

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[58]Patterson, "What's Behind the Shutdowns?", p. 49.
[59]"State Aid to Private Education: An Assessment," *Compact*, 4 (February 1970), p. 19.
[60]Campbell *et al.*, *Organization and Control*, p. 551.
[61]James H. Koch, "Tax Credits in New Mexico," *Compact*, 4 (February 1970), p. 28.
[62]Edward J. Copeland, "Purchasing Secular School Services," *Compact*, 4 (February 1970), p. 30.
[63]William H. Conley, "Financial Aid for Our Schools," *Catholic School Journal*, 60 (March 1969), p. 4.
[64]Patterson, "What's Behind the Shutdowns?"
[65]Richard B. Ogilvie, "Illinois Private Schools," *Compact*, 4 (February 1970), p. 35.

ture."[66] In 1969, New York City alone had 360,000 students attending Catholic schools.

For the 1970-71 school year, in the United States, the average estimated expenditure for public elementary and secondary schools per pupil in average daily attendance was $839.[67] Given the 4.6 million Catholic students currently attending nonpublic schools, it can be seen that if all Catholic schools were to close, the annual additional cost would be $3,854,800,000.

Theories Underlying Parochial Aid

Catholic attempts to gain public aid have proceeded under two basic premises: (1) child-benefit theory, and (2) contract theory. The logic used in the child-benefit theory is that states may extend public aid to assist all children in the acquisition of learning in secular subjects. The fact that parochial schools also benefit from the aid can then be ignored. A corollary is that the state is the ultimate beneficiary of the child's secular education and, therefore, should contribute toward its financing.

The contract theory embraces the concept that states can enter into legal contracts with any organization to buy services it would otherwise have to provide itself. In buying educational services from parochial schools, the state, according to this theory, is merely fulfilling conditions of the constitutional mandate to provide education. Such contracts are carefully worded to avoid speaking in terms of aid to parochial schools.

Free textbooks and transportation are among the aids extended under the child-benefit theory. The loaning of textbooks to parochial children was first established by the United States Supreme Court in *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930). In 1968, the practice of loaning textbooks was again sustained by the Court, which established that the legislation involved had "a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[68] In *Everson v. Board of Education*, 330 U.S. 1 (1947), the practice of reimbursing parents for the cost of transporting their children to parochial schools was upheld.

At the other end of the continuum is the practice of providing

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[66]Patterson, "What's Behind the Shutdowns?"

[67]"Financial Status of the Public Schools, 1971," (Washington, D.C.: Research Division of the National Education Association, 1971), p. 28.

[68]Board of Education v. Allen, 392 U.S. 236 at 240 (1968).

direct aid under the contract theory. Direct aid often means paying a certain percentage of the salaries of religious teachers of secular subjects.

In between textbook loans and direct aid are alternative methods, such as providing pupil personnel services (for example, guidance) and psychological and speech correction services. "This assistance would not be of significant help to schools in meeting their financial burdens, inasmuch as most of them do not provide such services now."[69] Remedial instruction in various subjects, entailing the provision of remedial teachers at public expense, is an option.

Several states have worked out "dual enrollment" arrangements whereby nonpublic students attend public schools part time. "Public financing of dual enrollment classes would presumably be shared by the student's home district and the state."[70] There is also the practice of granting tuition scholarships or vouchers to all nonpublic school students. "This would take the form of state subsidies paid to parents to apply against tuition charges in nonpublic schools."[71] Finally, there have been proposals to rebate certain proportions of state taxes to all parents with children in schools.

In summary, public aid to parochial schools so far has been substantially less than "parity" (financing to an extent equal to that of public schools), but there is some evidence that parity is now the goal of parochial schools:

> On November 20, 1969, a suit was started in the Federal District Court in St. Louis seeking to invalidate provisions of the Missouri state constitution which bar the use of public funds "to help support or sustain any private or public school . . . or other institution of learning controlled by any religious creed, church, or sectarian denomination whatever. . . ." The suit was brought by parents of children attending parochial schools and by parents who are unable to send their children to such schools because of financial burdens.
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> The legal position of the plaintiff's was simple. The federal Constitution, they said, guarantees their right to send their children to parochial or other nonpublic schools rather than to public schools. The state may not discriminate against the parents who make that choice. However, it does engage in such discrimination, they assert, by paying for the education of only those children whose parents choose to send them to public schools.
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> The complaint asks the court to declare unconstitutional those provisions of the state constitution (and corresponding statutes) which limit state support to public schools and to direct the state officials to 'take

[69] "Alternative Methods of Nonpublic Aid," *Compact*, 4 (February 1970), p. 23.
[70] *Ibid.*
[71] *Ibid.*

action to extend the benefits of free education to all persons. . . . ' It further asks that the state authorities be directed to adopt as soon as possible 'a plan of distribution of funds for educational benefits and purposes, which plan shall not discriminate against any person on account of race, creed or color and which plan shall not restrict or impede the free exercise of religion.'

This suit serves at least to clarify the objective of those supporting state aid to nonpublic schools. It also reveals what is at stake—full financing of all but the purely religious aspects of religiously-affiliated schools.[72]

Whether public funds may be used for the support of religious schools is not an academic issue to be debated only by scholars. It is a very real question that, when answered, will affect a sizeable number of taxpaying citizens. If the answer should be no, it might mean the demise of many parochial schools and an immediate strain on the facilities of the public schools. If the answer is yes, it would mean that many citizens would be taxed to support religions foreign to their ideals. Barring a United States Supreme Court decision concrete enough to preclude debate, the answer lies in (1) the historical relationships between religions and governments, which provided the basis for our constitutional and statutory laws, and (2) the legal precedents set by federal court decisions.

3. FEDERAL AND STATE PROVISIONS FOR THE SEPARATION OF CHURCH AND STATE

In one manner or another the federal government and all state governments have constitutional or statutory provisions that guard against the intermingling of church and state. The federal constitutional provisions are less specific and more comprehensive than those of most states and, as the supreme laws of the land, act as a check on the various states.

Federal Provisions

Two provisions affecting church-state separation are the so-called establishment of religion and free exercise clauses embodied in the first article of the Bill of Rights. The First Amendment reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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[72] Joseph B. Robinson, "In Congress, the Legislatures and the Courts," *Compact*, 4 (February 1970), p. 8.

The amendment is catholic in nature and not specifically termed to outlaw, for example, expenditure of public funds for parochial schools. However, an interpretation exists with regard to the broad relationship between religion and government. In 1966, Maryland's highest court ruled:

> . . . the problem to be considered and solved when the First Amendment was proposed was one of blunt and stark reality, which had perplexed and plagued the nations of Western Civilization for some 14 centuries, and during that long period, the union of Church and State in government of man had produced neither peace on earth, nor good will to man.[73]

The meaning of the free exercise clause of the First Amendment has generated little controversy: no law shall prohibit the free exercise of religion. However, the establishment of religion clause was clarified only in 1947 when the United States Supreme Court declared:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or instructions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."[74]

Seven years prior to the Court's statement, the absorption theory was accepted: the guarantees of the First Amendment were absorbed by the Fourteenth Amendment and thereby extended to the citizens of the states. The Fourteenth Amendment reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Before 1940 it was assumed, not without some justification, that

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[73]Horace Mann League v. Board of Public Works, 242 Md. 645 (1966).
[74]Everson v. Board of Education, 330 U.S. 1 at 15 (1947).

only Congress was bound by the establishment clause, and that states were not so bound. At least four lines of logic have been used to support this supposition. First, it is reasoned that if the establishment clause is taken literally, then it is conceptually impossible for the absorption theory to work. This is so because the Fourteenth Amendment, while necessitated by the absorption theory, is in itself a law *respecting* an establishment of religion; it would, therefore, *ipso facto* violate the First Amendment.

Second, when the First Amendment was passed, there existed official churches in various newly formed states, and there is no evidence that the framers of the Constitution intended the First Amendment to disestablish these established state religions.

Third, it has been suggested that liberties guaranteed by the Fourteenth Amendment cannot include the establishment clause, because that clause does not deal with the protection of a "freedom" of individuals.

Fourth, it has been argued that framers of the Fourteenth Amendment never intended that amendment to absorb the First Amendment. This argument is based on the rationale that seven years after the passage of the Fourteenth Amendment, the Forty-fourth Congress, including twenty-four of the framers of the Fourteenth Amendment, debated the Blaine Amendment, which would have prohibited the states from making laws respecting the establishment or free exercise of religion. That amendment passed the House of Representatives by a 180-to-7 vote but failed to gain the needed two-thirds vote in the Senate.[75] It is claimed that this amendment would have been considered altogether superfluous if the Fourteenth Amendment had already absorbed the First Amendment.

But those speculations are now largely academic in view of the 1940 Supreme Court ruling that federal and state governments have the same relationship to religion.[76] The Fourteenth Amendment has since been held by the Court to assure all First Amendment rights to the citizens of the states.

State Provisions

State provisions dealing with the separation of church and state were nearly always drafted in the name of God. Many state constitutions protect religion and churches while at the same time

[75] *Congressional Record*, 44th Cong., 1st Sess., (1875), IV, 5189-5191.
[76] Cantwell v. Connecticut, 310 U.S. 296 (1940).

building higher the wall separating the church and the state. Nothing is to be found in state constitutions that is hostile to religion; nor do the courts advocate hostility. The Supreme Court has said:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of men deems necessary . . . we find no constitutional requirement which makes it necessary for government to be hostile to religion, and to throw its weight against efforts to widen the effective scope of religious influence.[77]

While most states have clauses that separate the secular activities of the government from sectarian functions of the church, preambles to many constitutions reflect a reliance on God.

Although five states have no preambles (New Hampshire, Ohio, Oregon, Vermont, and Virginia), each has a section in its constitution that recognizes God.

In addition to expressing gratefulness to God and invoking His blessings, various preambles express hopes for a more perfect government, recognize the privilege of choosing and forming their own government, set forth the desire to ensure tranquillity, and demonstrate the willingness to transmit to posterity all that is sought.

All state constitutions provide for the separation of church and state, though many state legislators are beginning to feel pressures from some groups for constitutional revisions to eliminate such separation. Separation is accomplished in various ways. Typically there are prohibitions against one or more of the following: (1) required attendance at religious worship; (2) establishment of religion; (3) interference with freedom of worship or conscience; (4) religious tests as a qualification for holding a public office, being a witness in a court, or being admitted to a public school; (5) questions touching on matters of religious beliefs in any court; (6) sectarian instruction in public schools; and (7) required support for religious or sectarian institutions, or religious or sectarian schools.

Codes of state constitutional and statutory provisions that b[illegible] upon prohibitions against mixing state and religious matter[illegible] listed in Appendix A. Some prohibitions—for example, aga[illegible] requiring support for sectarian schools—are mitigated by certain other constitutional or statutory provisions. For instance, several constitutions have provisions allowing for the transportation "of all

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[77]Zorach *et al.* v. Clausen, 343 U.S. 306 at 314 (1952).

children" to schools. Those types of provisions are discussed in chapter 4.

Thirty-eight states have constitutional prohibitions against religious qualifications for holding a public office, being a witness, or being admitted to a public school. Besides these specific prohibitions, several constitutions mention that voters and jurors shall not be disqualified on the basis of religious beliefs. Some states also declare generally that there shall be no diminution of civil rights on account of religious beliefs.

Forty-six states prohibit interference with the free exercise of worship or conscience. Most states equate freedom of worship with liberty of conscience.

Nineteen states have clauses designed to ensure that freedom of religion does not allow for the destruction of the peace. The Georgia constitution is typical: "The right of liberty of conscience shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the State."[78] Two states, Idaho and New Mexico, have attached to their religious clauses provisions designed to prohibit polygamy and bigamy. Six other states have sought to ensure that religious tolerance does not abridge the government's right to require oaths.

Twenty-nine states prohibit required church attendance, and thirty-four states have clauses that preclude the establishment of any religion, denomination, or mode of worship. Ten states (Arizona, California, Georgia, Massachusetts, Nevada, North Carolina, Oklahoma, Oregon, Washington, and Wyoming) have neither of these proscriptions. Massachusetts prohibits laws that would restrict the "free exercise" of religion. And the other states have some type of synonymous clause.

Ten state constitutions prohibit the dispensation of sectarian instruction in the public schools: Arizona, California, Colorado, Idaho, Montana, Nebraska, Nevada, South Dakota, Wisconsin, and Wyoming. For example, Wyoming's constitution says:

> No sectarian instruction, qualifications or tests shall be imparted, exacted, applied or in any manner tolerated in the schools of any grade or character controlled by the state, nor shall attendance be required at any religious service therein, nor shall any sectarian tenets or doctrines be taught or favored in any public school or institution that may be established under this constitution.[79]

[78]Georgia, *Constitution*, Article I, Section I, Paragraph XIII.
[79]Wyoming, *Constitution*, Article VII, Section 12.

In addition, five states (Arizona, Kansas, Mississippi, Ohio, and Utah) stipulate that the schools and the school funds of the state shall not fall under any sectarian control. Moreover, the constitution of the state of Washington says, "[A]ll schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."[80]

Table 1 lists states that have constitutional clauses* prohibiting the requirement of support for religious or sectarian institutions and/or schools. Forty-two state constitutions have provisions that either prohibit the requirement of support for religious institutions, or preclude the payment of any tax monies for such institutions. For example, Michigan's constitution states that "no person shall be compelled . . . to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teachers of religion."[81] Florida's constitution reads, "[N]o money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian instituton."[82] The words surrounding "institution" among the various constitutions describe ministers, ministries, places of worship, religious sects or creeds, universities and hospitals of particular sects, and religious exercises.

In addition to restricting the usage of tax funds, nineteen states prohibit the granting of any personal property received by contribution for use by religious or sectarian institutions. For example, Colorado's constitution says, "[N]or shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation, to any church, or for any sectarian purpose."[83] Virginia and West Virginia have clauses stipulating that the general assembly cannot allow the people to levy on themselves a tax for the support of religious institutions:

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*Note—Michigan's constitution was amended by referendum, November 3, 1970, adding to Article 8, Section 2, these words: "No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any lcation or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school."

[80]Washington, *Constitution*, Article IX, Section 4.
[81]Michigan, *Constitution*, Article I, Section 4.
[82]Florida, *Constitution*, Article I, Section 3.
[83]Colorado, *Constitution*, Article IX, Section 7.

TABLE 1

STATE PROHIBITIONS AGAINST REQUIRING SUPPORT FOR RELIGIOUS OR SECTARIAN INSTITUTIONS AND RELIGIOUS OR SECTARIAN SCHOOLS

STATES	RELIGIOUS OR SECTARIAN INSTITUTIONS	RELIGIOUS OR SECTARIAN SCHOOLS
Alabama	x	
Alaska		x
Arizona		x
Arkansas	x	x
California	x	x
Colorado	x	x
Connecticut	x	
Delaware	x	
Florida	x	
Georgia	x	
Hawaii	x	x
Idaho	x	x
Illinois	x	x
Indiana	x	
Iowa	x	
Kansas	x	
Kentucky	x	x
Louisiana	x	x
Maryland	x	
Massachusetts	x	x
Michigan	x	
Minnesota	x	x
Mississippi		x
Missouri	x	x
Montana	x	x
Nebraska	x	x
Nevada	x	
New Hampshire		x
New Jersey	x	
New Mexico	x	
New York		x
Ohio	x	
Oklahoma	x	
Oregon	x	
Pennsylvania	x	
Rhode Island	x	
South Carolina	x	x
South Dakota	x	
Tennessee	x	
Texas	x	
Utah	x	x
Vermont	x	
Virginia	x	x
Washington	x	x
West Virginia	x	
Wisconsin	x	
Wyoming	x	x

> And the General Assembly shall not . . . pass any law requiring or authorizing any religious society, or the people of any district within this State; to levy on themselves, or others, any tax for the erection or repair of any house of worship, or for the support of any church or ministry. . . . [84]

Twenty-three states specifically prohibit the use of public support in any fashion for religious or sectarian schools. Of the remaining twenty-seven states, sixteen have established school funds and have constitutional provisions that restrict those funds to the operation of public schools. Nothing is said about the use of unrestricted tax funds for the support of religious schools. Indiana's constitution is illustrative:

> The principal of the Common School fund shall remain a perpetual fund, which may be increased, but never be diminished; and the income thereof shall be inviolably appropriated to the support of Common Schools, and to no other purpose whatever.[85]

New York's prohibition against aid to religious schools has been mislabeled the "Blaine Amendment." The amendment has earned the reputation of being strict, and though it is, in fact, restrictive, it specifically allows the transportation of *all* children to and from schools. In 1969 a series of bills designed to repeal the "Blaine Amendment" were introduced before the New York Legislature, but all failed to pass.[86]

California's constitution states that "no public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools."[87] In 1969 two amendments to this clause were introduced: one providing tuition grants to children in parochial schools from kindergarten through grade twelve, and the other providing to all pupils of the state tuition grants or vouchers redeemable by any private or public school meeting requirements prescribed by the legislature.[88] Both bills failed to get out of committee in 1969.

The constitution of Massachusetts cautions that:

> . . . no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aid-

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[84]Virginia, *Constitution*, Article IV, Section 58.
[85]Indiana, *Constitution*, Article 8, Section 3.
[86]"Public Aid to Religiously Affiliated Schools—The Record of the State Legislatures in 1969," mimeographed (New York: Commission on Law and Social Action of the American Jewish Congress, 1969), p.11.
[87]California, *Constitution*, Article IX, Section 8.
[88]American Jewish Congress, "Public Aid to Religiously Affiliated Schools," p. 3.

ing any school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated. . . . [89]

Two amendments to the Massachusetts Constitution have been approved by the legislature: H.526 would authorize payment of the salaries of private school teachers who do not teach sectarian subjects, and H.1037 would authorize grants-in-aid to private educational institutions. But before these measures can become law, they must again be approved by the legislators in the 1971-72 session, and then be presented for ratification in a public referendum. Also, under amendment H.4930, a commission has been approved to study such things as the federal and state constitutional implications of using public funds for the support of religious schools.[90]

Hawaii's prohibition is brief: "There shall be no segregation in public educational institutions because of race, religion or ancestry; nor shall public funds be appropriated for the support or benefit of any sectarian or private educational institution."[91] The Hawaii Supreme Court has declared a statute authorizing transportation for parochial school students to be in violation of the state constitution. Following that declaration an amendment to the constitution was introduced making transportation subsidies to parochial and private schools an exception. However, the proposed amendment has failed to get out of committee.[92]

Until 1968, Indiana's constitution stated simply that "no money shall be drawn from the treasury, for the benefit of any religious or theological institution."[93] In August of that year, a state Constitutional Revision Commission approved the addition of the following words: "for the promotion of religion."[94]

Finally, the constitution of Virginia disallows the appropriation of public funds for schools not under the exclusive control of the state. In 1969, Joint Resolution 25 proposed an amendment that would permit limited expenditures for nonpublic schools. Such strong opposition developed that in 1970 the amendment was dropped.[95]

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[89]Massachusetts, *Constitution*, Article XLVI, Section 2.
[90]American Jewish Congress, "Public Aid to Religiously Affiliated Schools," pp. 7-8.
[91]Hawaii, *Constitution*, Article IX, Section 1.
[92]American Jewish Congress, "Public Aid to Religiously Affiliated Schools," p. 4.
[93]Indiana, *Constitution*, Article I, Section 6.
[94]"Constitutional Revision—The Greatest Peril of All," *Church & State*, 22 (September 1969) p. 7.
[95]"Virginia Keeps Religious Freedom," *Church & State*, 23 (April 1970), p. 3.

4. FEDERAL AND STATE PROVISIONS PERMITTING THE USE OF PUBLIC FUNDS FOR RELIGIOUS SCHOOLS

The clamor for public aid for parochial schools is growing louder and, despite a vigorous counterattack from defenders of the separation-of-church-and-state principle, dollars are beginning to flow rapidly.

Thirty-six states now provide some assistance to parochial schools. "Federal assistance, almost nil before 1965, is estimated to have totaled $250-million in the last five years."[96] It is imperative to examine federal and state laws that released such funds.

Federal Aid to Parochial Schools

Prior to 1965 massive federal-aid-to-education bills were opposed by an extremely unlikely coalition. Northern liberals, who opposed federal aid to segregated school systems, and Southern conservatives, who balked at the idea of federal aid to parochial schools, combined repeatedly to defeat educational legislation. Between 1946 and 1965 a total of fourteen proposals for various sorts of general educational aid were defeated.

By 1964 the segregation drawback was effectively forestalled, since Title VI of the Civil Rights Act of 1964 precluded discrimination on the basis of race wherever federal assistance was provided. However, concerning assistance to parochial schools, the real power and substance of the act reside in what it does not say. Section 601 reads:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[97]

It has been noted that the act is conspicuously silent with respect to discrimination on the basis of religion.

The following year, 1965, saw, at least administratively speaking, a way around the remaining opposition to parochial aid. On January 12, 1965, President Johnson sent an educational message to Congress that attacked the issue of federal aid to parochial schools in a new manner. Approaching the matter indirectly, the president spoke of economically and educationally disadvantaged children. The stress was placed on aid to individual students, and not to church-related schools: "I urge that we now push ahead with

[96] Associated Press dispatch, *New York Times*, October 17, 1970.
[97] Public Law 88-352, Section 601.

the number one business of the American people—the education of our youth in pre-schools, elementary and secondary schools, and in the colleges and universities."[98] On April 11, 1965, the Elementary and Secondary Education Act of 1965 was passed into law. This act releases assistance to parochial schools in at least fifteen different forms, though nowhere are the words *parochial* or *church-related* schools to be found.

Before 1965 there existed six acts providing some assistance to elementary and secondary parochial schools: the Servicemen's Readjustment Act of 1944, the National School Lunch Act of 1946, the Federal Property and Administration Services Act of 1949, the Agriculture Act of 1954, the National Defense Education Act of 1958, and the Economic Opportunity Act of 1964.

National School Lunch Act of 1946

By this act both grants-in-aid and surplus food are made available to state agencies, through the Department of Agriculture, for the establishment of nonprofit school-lunch programs. "Such meals shall be served without cost or at a reduced cost to children who are determined by local school authorities to be unable to pay the full cost of the lunch.[99]

Wherever state laws forbid the disbursement of federal funds to nonprofit private schools, the secretary of agriculture is authorized to deal directly with such schools.

Federal Property and Administration Services Act of 1949

This act authorizes the administrator of General Services to donate for educational purposes to tax-supported school systems and "to other non-profit schools" such things as materials, books, buildings, fixtures, equipment, supplies, and other surplus property.

Agriculture Act of 1954

Since 1954, under the administration of the Commodity Credit Corporation, funds have been distributed to participating nonprofit schools to increase the consumption of fluid milk.

By amendment (P.L. 84-752), milk may now be distributed to "children in the United States in (1) nonprofit schools of high school grade and under, and (2) nonprofit nursery schools, child-care cen-

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[98]"President Calls for Broad Elementary, Secondary and College Educational Aid Programs," in *Congressional Quarterly Almanac*, XXI (Washington, D. C.: Congressional Quarterly Service, 1965), p. 1374.
[99]Public Law 79-396, Section 9.

ters, settlement houses, summer camps, and similar nonprofit institutions devoted to the care and training of children."

National Defense Education Act of 1958

The commissioner of education may make loans to nonprofit elementary and secondary schools for the "acquisition of laboratory and other special equipment, including audio-visual materials and equipment and printed materials (other than textbooks) suitable for providing education in science, mathematics or modern foreign language."[100] In addition, funds are available for the minor remodeling of laboratories. A later amendment (P.L. 88-665) allows funds to be spent in history, civics, geography, economics, industrial arts, and English or reading.

Title V, if authorized by state law, would provide private secondary schools with programs of guidance and counseling to "advise students of courses of study best suited to their ability, aptitudes and skills, and . . . to encourage students with outstanding aptitudes and ability to complete their secondary school education" and to become equipped to enter college.[101] Subsequent amendment (P.L. 88-665) extended this benefit to private elementary schools.

Economic Opportunity Act of 1964

By amendment (P.L. 89-253) grants may be made directly to private nonprofit schools for the purpose of funding community action programs. These programs are designed to eliminate educational deficiencies caused by poverty and to entail remedial education projects.

In addition, Title VIII of an amending act (P.L. 89-794) allows VISTA volunteer workers to assist private schools in programs aimed at eradicating educational deficiencies caused by poverty.

Most of these acts contribute relatively insignificant amounts to parochial schools. "The major breakthrough for private schools came with the passage of the Elementary-Secondary Education Act of 1965, which funnelled millions of dollars into parochial schools through Federal programs."[102]

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[100]Public Law 85-864, Section 303.
[101]Public Law 85-864, Section 503.
[102]Associated Press dispatch, *New York Times*, October 17, 1970.

Elementary and Secondary Education Act of 1965

Section 205 of Title I-ESEA-1965[103] provides funds for programs of dual enrollment in which elementary and secondary students of private schools may participate. In addition, for the purposes of remedial instruction, such equipment as educational radio, television sets, and other mobile educational equipment may be used on the premises of private schools.

Section 203 of Title II-ESEA-1965 authorizes money to be spent for the

> acquisition of library resources (which for the purposes of this title means books, periodicals, documents, audio-visual materials, and other related library materials), textbooks, and other printed and published instructional materials for the use of children and teachers in public and private elementary and secondary schools in the State. . . .[104]

Materials are limited to those approved for use in the state's public schools. Ownership of all materials must be vested in a public agency.

Title III offers a number of services to public and other nonprofit schools. Included among these services are guidance and counseling, remedial instruction, health and physical education programs, recreational programs, psychological services, educational equipment, and the talents of a variety of specially qualified personnel. Money is made available to states for the construction and maintenance of centers through which such services are extended to the schools.

Higher Education Act of 1965

Under Section 408 of the Higher Education Act of 1965, contracts may be made with public and nonprofit institutions to establish programs for the purposes of:

> 1. Identifying qualified youths of exceptional financial need and encouraging them to complete secondary school and undertake post-secondary educational training,
> 2. Publicizing existing forms of student financial aid, including aid furnished under this part, or
> 3. Encouraging secondary-school or college dropouts of demonstrated aptitude to reenter educational programs, including post-secondary-school programs.[105]

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[103]Title I of ESEA-1965 merely incorporated Title I of an earlier law (P.L. 81-874); in addition, Title II of P.L. 81-874 was revised (to include provisions for public and private school children of low-income families) and also incorporated as part of Title I of ESEA-1965; therefore, as an example Section 201, unless specified as being a section of Title II-ESEA-1965, would refer to Title I-ESEA-1965.

[104]Public Law 89-10, Section 203, Title II.

[105]Public Law 89-329, Section 408.

Title V of the act allows either experienced teachers or teaching teams drawn from the Teacher Corps to be used in the schools of local educational agencies.

Veteran's Readjustment Benefits Act of 1966

According to this act, any veteran having served on active duty in the armed forces for 180 days or more since January 31, 1955, is entitled to educational assistance. Each veteran is eligible to receive a subsistence allowance for each month of his service up to thirty-six months. The veteran may enroll at any school, public or private, as long as it furnishes education at the secondary level or above.

From 1944 until 1955, the Servicemen's Readjustment Act of 1944 (P.L. 78-346) served essentially the same purpose as this act, except that it provided funds for elementary education as well.

Child Nutrition Act of 1966

This act provides funds for a breakfast program for needy children. Funds are paid to the state, which then reimburses the schools for the cost of obtaining agricultural products for the breakfast programs. In addition, the costs of processing, distributing, transporting, storing, and handling the food are reimbursable.

Where states are prohibited by law from distributing federal funds to private schools, the secretary of agriculture may deal directly with the schools.

Table 2 lists the federal acts that have been discussed and the assistance they provide to private nonprofit, including parochial, schools.

State Aid To Parochial Schools

Notwithstanding the many state constitutional strictures in America, on July 1, 1971, thirty-five states had eighty-seven laws making public assistance available to elementary and/or secondary parochial schools or parochial school students.[106]

Most parochial-aid laws offer only fringe-type concessions such as transportation, books, lunches, and health services. Some of these laws, though approved by the United States Supreme Court, may be questionable under their respective state constitutions.

[106]Research for the codes to state laws ended on July 1, 1971; the codes to laws enacted prior to that date are included in Appendix B. However, since July 1, several new laws have been legislated. Those new laws appear in the discussion and related tables, but their codes are not included in the appendix. Such laws without codes are identified in the appendix by an asterisk.

TABLE 2

FEDERAL ACTS AND TYPES OF ASSISTANCE TO ELEMENTARY AND SECONDARY RELIGIOUS SCHOOLS

TYPES OF ASSISTANCE	FEDERAL ACTS	NATIONAL SCHOOL LUNCH ACT OF 1946	FEDERAL PROPERTIES AND ADMINISTRATION SERVICES ACT OF 1949	NATIONAL SCIENCE FOUNDATION ACT OF 1950	AGRICULTURE ACT OF 1954	NDEA OF 1958	ECONOMIC OPPORTUNITY ACT OF 1964	HIGHER EDUCATION ACT OF 1965	ESEA OF 1965	VETERAN'S READJUSTMENT BENEFITS ACT OF 1966	CHILD NUTRITION ACT OF 1966
Dual Enrollment									x		
Movie Projectors									x		
Television Sets									x		
Teacher Aides*									x		
Books			x						x		
Textbooks									x		
Periodicals									x		
Audio-Visual Materials									x		
Documents									x		
Other Printed and Published Instructional Materials									x		
Guidance and/or Counseling				x					x		
Health Programs									x		
Physical Education Programs									x		
Psychological Services									x		
Other Special Curriculum Programs						x			x		
Loans for Remodeling Laboratories						x					
Testing Programs to Identify Students of Outstanding Aptitudes						x		x			
Buildings			x								
Building Fixtures			x								
School Lunches**	x										
Milk					x						
Breakfasts**											x
Cafeteria Equipment											x
Experienced Teachers*								x			
Teaching Teams*								x			
Grants to Establish Remedial Education Programs							x				
Volunteer VISTA Workers*							x				
Pay to Certain Students to Cover Secondary Education Costs										x	
Building Materials and Equipment			x								

*For work in remedial areas.
**For needy children.

Many state legislatures, aware of the binding powers of their state constitutions, have sought direct support of voters through referenda. Other legislatures have preferred to pass highly controversial parochial-aid bills into law and to accept judgment of the courts. Laws currently producing the keenest debate are the purchase-of-services acts, "parent reimbursement" acts, and others approaching direct aid to parochial schools.

TABLE 3

STATES WITH PURCHASE OF SECULAR EDUCATIONAL SERVICES LAWS AND OTHER DIRECT AID LAWS

STATES	PURCHASE OF SERVICES LAWS	OTHER DIRECT AID
Connecticut	x	
Hawaii		x
Louisiana	x	
Mississippi		x
New Jersey	x	
New York	x	
Ohio	x	
Pennsylvania	x	
Rhode Island	x	
Vermont		x

Table 3 identifies states that have enacted into law either purchase-of-secular-educational-services acts or other acts providing direct financial aid to elementary and secondary parochial schools.

Purchase-of-Secular-Educational-Services Laws

Connecticut's Nonpublic School Secular Education Act pays 20 percent of the salaries of nonpublic school teachers who teach secular subjects. Secular subjects are considered to be any course found in the curricula of public schools. In addition, the act allows purchase of books for nonpublic school students. Funds for these forms of assistance must come from sources other than the general school fund, since the state constitution restricts the use of money from this fund to the public schools.

To receive funds under the act, nonpublic schools must, within three years from the date of the act, submit the names of teachers who have met the same certification requirements as public school teachers; use textbooks approved by the secretary of the State Board of Education; provide secular educational courses required by law; meet adequate safety, sanitary, and construction require-

ments; and comply with Title VI of the Civil Rights Act of 1964. Provision is made for the secretary to inspect every nonpublic school applicant to ensure compliance with the requirements of the act.

Since the promulgation of the act, a federal district court has held that it violates the First Amendment of the federal Constitution. The case has since been appealed directly to the United States Supreme Court.

The Louisiana Constitution prohibits the use of public funds for any "private or sectarian school." Therefore, Louisiana's Secular Educational Services Act pays salaries directly to the private school teachers, not to the school. Unlike Connecticut's act, Louisiana's act pays the total cost of teachers' salaries. However, the Louisiana act has also been held unconstitutional. The Louisiana Supreme Court found that the act violated the spirit of the state constitution.

Ohio has an auxiliary services act that, among other things, provides tax funds for contracts between individual school districts and lay teachers of secular services in private, nonprofit schools. The amount of salary paid to a particular teacher is based on the percentage of full-time service the teacher devotes to instruction in secular subjects. Schools receiving funds under this act are required to implement pupil achievement evaluation programs, and to make these results available to the Ohio superintendent of public instruction. An Ohio State court has upheld the act, but it is under continued court challenge since the plaintiffs have now appealed the case to a higher court.

Rhode Island's Salary Supplements to Nonpublic Schoolteachers Act pays 15 percent of the salaries of nonpublic school teachers who teach secular subjects such as those found in the public schools. A three-judge federal district court found that this act violated the First Amendment of the federal Constitution. The case was appealed to the United States Supreme Court, which found the law unconstitutional on June 28, 1971.

Michigan had an auxiliary services act that paid 50 percent of the salaries of nonpublic school teachers who taught secular subjects. However, all forms of parochial aid except transportation were cut off this year via referendum.

Pennsylvania's Nonpublic Elementary and Secondary Education Act is considered as the prototype for other similar laws. The law provides funds for the total salaries of nonpublic teachers teaching

secular subjects, for approved textbooks, and for instructional materials (including books, periodicals, photographs, musical scores, maps, sound recordings, processed slides, transparencies, films, video tapes, or any other printed and published materials of a similar nature).[107]

Money for such expenditures is drawn from a fund especially created for the act. Revenues for the fund are proceeds from horse racing and harness racing conducted in the state.

A three-judge federal district court, by a two-judge majority, upheld the Pennsylvania law, but the decision was appealed to the United States Supreme Court and the law declared unconstitutional on June 28, 1971.

Other Direct Aid Laws

The other state laws that appropriate direct aid to parochial schools include Hawaii's tax credit act, Mississippi's student loan law, and Vermont's law paying for the tuition of private school children in elementary and secondary schools.

Hawaii's law makes tax credits available to the parents of all students and is adjusted to offer greater relief to the lower income taxpayers.

Under the Mississippi law, private school students can borrow up to $200 a year for a maximum amount of $2,400. If, upon graduation, the recipient continues to live in the state, the loan is forgiven at the rate of $100 a year for up to five years. If the recipient continues to live in the state and attends a Mississippi institution of higher education, the loan is forgiven at the rate of $200 per year. If the recipient teaches in Mississippi, the loan is forgiven at the rate of $400 per year. This law is now being challenged in a United States district court.

The Vermont law provides funds for the tuition of private school pupils up to an amount equal to the average cost of a comparable year of public school education.

Shared-Time and Driver Education Laws

Twenty-one states engage in shared-time or provide driver education courses to parochial elementary and/or secondary schools.

Shared-time is an arrangement whereby parochial school students can attend public schools for specific courses, and then return to their respective schools. The courses normally taken re-

[107]Pennsylvania, *Public Laws of Pennsylvania—1968*, Act 109.

quire expensive equipment that the highly academic-oriented parochial schools are unable to afford.

Connecticut's shared-time law is incorporated in its purchase-of-services act. Section 16 reads:

> The secretary shall encourage boards of education of public schools and governing boards of nonpublic schools to share facilities and personnel on a voluntary basis. No public school teachers shall be required to teach in a nonpublic school.[108]

Most states derive the authorization for shared-time or dual enrollment from laws pertaining to the apportionment of funds based on average daily attendance. For example, Illinois law states: "Pupils regularly enrolled in a public school for only a part of the school day may be counted on the basis of 1/6 day for every class hour attended pursuant to such enrollment."[109]

Colorado allows for shared-time through a law that accepts federal funds for private school purposes. Kentucky has permissive legislation only, leaving shared-time arrangements to the discretion of local boards.

Driver education, wherever available to private school students, is usually conducted in public high schools only. Iowa's authorization to conduct driver education courses for parochial schools is taken from an omnibus law that makes most special educational services carried out in public schools available to nonpublic schools. Although South Dakota does not cover much of the cost of driver education courses, it offers equal assistance to public and private schools.

Textbooks and Transportation

Twenty-eight states provide parochial elementary and/or secondary school students with textbooks and transportation.

Eleven states loan textbooks to nonpublic (including parochial) school students. Most state laws seek some type of guarantee that books loaned will not be religiously oriented to the extent of advancing religious ideologies. New York's law specifies:

> Textbooks loaned to children enrolled in grades seven to twelve of said private schools shall be textbooks which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities.[110]

[108]Connecticut, *Public Acts—Connecticut—1969* Act 791-69, section 16.
[109]Illinois, *Smith-Hurd Illinois Annotated Statutes*, Chapter 122, section 18-8, 1 (a).
[110]New York, *McKinney's Consolidated Laws of New York Annotated 1970*, Book 16, section 701.

New York's textbook law has been challenged in court; in 1968 the United States Supreme Court ruled by a six-to-three decision that the New York law was not a violation of the First Amendment.[111]

Prior to the New York case, the Supreme Court held that a Louisiana textbook law was not in violation of the Fourteenth Amendment and, in the process, enunciated the famous child-benefit theory—that such aid is for the child and the state and not intended to assist a religion.[112]

Indiana and West Virginia loan textbooks to parochial school students only when the students are too poor to pay for them.

Twenty-six states have laws that make transportation available to parochial school students. Most state laws limit such transportation to nonpublic school students living along the school bus route. That is, no new routes are established for the purpose of transporting nonpublic school students. The law of Kansas is illustrative:

> . . . [P]upils residing in such school districts attending private or parochial schools of elementary and high school grades which are approved by the state board of education . . . shall be entitled to the privilege of such school-bus transportation upon such regular route as arranged for the benefit of pupils attending public schools.[113]

In 1947 the United States Supreme Court upheld New Jersey's transportation law, which allows parents to be reimbursed by tax money for the cost of transporting pupils to parochial schools.[114]

Kentucky's transportation law is framed in permissive language. Maryland does not have a state law; rather, special enabling legislation has been passed for thirteen of the twenty-four school systems of the state. Finally, Montana transports nonpublic students only when the parent agrees to pay the proportionate cost.

Lunches and Health Services

Thirteen states have special legislation designed to provide nonpublic (including parochial) schools with lunches and health services.

Although some states make state tax funds available for financing lunch programs of nonpublic schools, most include laws that accept federal funds for that purpose. In states where such laws are absent, parochial schools deal directly with the federal govern-

111Board of Education v. Allen, 392 U.S. 236 (1968).
112Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930).
113Kansas, *Kansas Statutes Annotated*, V, section 72-8306.
114Everson v. Board of Education, 330 U.S. 1 (1947).

ment, bypassing the state. Oregon's law, under *Lunch Programs*, says:

> The Superintendent of Public Instruction may accept and distribute donated commodities available for either public or private nonprofit educational institutions, subject to state or federal law or regulation relating to such acceptance and distribution.[115]

Six states have passed special legislation to equalize health services in public and nonpublic schools. Some state statutes, however, set forth in detail which services shall be provided to nonpublic schools. Kansas, for example, provides only hearing checks, whereas Connecticut provides a range of services:

> Such health and welfare services shall include the services of a school physician, nurse and dental hygienist, school psychologist, speech remedial services, school social worker's services, special language teachers for non-English speaking students and such similar services as may be provided by said town to children in attendance at public schools.[116]

Miscellaneous Assistance

Seven states (Connecticut, Iowa, Maryland, New Jersey, New York, Ohio, and Washington) have parochial-aid laws that would not fit neatly into any of the preceding categories.

Connecticut has a law exclusively designed to aid educationally deprived children in private schools. The act provides for a range of services, including prekindergarten programs, remedial programs, dropout programs, special library collections, funds for reducing class sizes, and various experimental programs.

Iowa, Ohio, and Washington have auxiliary services acts that, in effect, require school districts to provide the same services to private schools as they do for public schools. Specifically mentioned in the bills are such services as street crossing guards, school diagnostician services for mentally handicapped children, teacher-counsellor services for physically handicapped children, and remedial reading programs.

Maryland recently enacted a tuition-voucher plan. And a New Jersey law provides for special classes and other facilities for all handicapped students, including those in parochial schools.

Finally, a New York law reimburses private schools for the cost of record-keeping required by the state.

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[115]Oregon, *Oregon Revised Statutes*, III, section 327.520.
[116]Connecticut, *Public Acts—Connecticut*, special session, 1965, regular session, 1967, Act 481.

TABLE 4

STATE PROVIDING VARIOUS TYPES OF ASSISTANCE TO ELEMENTARY AND SECONDARY PAROCHIAL SCHOOLS

STATES	TYPES OF ASSISTANCE: TRANSPORTATION	TEXTBOOKS	LUNCHES	HEALTH SERVICES	SHARED-TIME	DRIVER EDUCATION	TEACHERS' SALARIES*	OTHER DIRECT AID	MISCELLANEOUS
California	x	x	x			x			
Colorado	x				x				
Connecticut	x	x		x		x	x		x
Delaware	x					x			
Hawaii						x		x	
Idaho	x								
Illinois	x		x		x	x			
Indiana	x	x							
Iowa				x	x	x			x
Kansas	x			x					
Kentucky	x				x				
Louisiana	x	x	x				x		
Maine	x								
Maryland	x				x				x
Massachusetts	x								
Michigan	x				x	x			
Minnesota		x		x		x		x	
Mississippi			x						
Missouri	x								
Montana		x							
Nebraska	x			x	x	x			
New Hampshire	x	x					x		x
New Jersey	x	x		x			x		x
New York	x					x	x		
North Dakota	x					x			
Ohio	x		x			x			x
Oregon	x					x			
Pennsylvania	x	x	x		x	x	x		
Rhode Island	x	x	x		x		x		
South Dakota						x			
Utah						x			
Vermont					x			x	
Washington									x
West Virginia	x	x				x			
Wisconsin	x								

*From purchase of secular services or auxiliary services acts.

Table 4 lists state parochial-aid laws as of July 1, 1971. Undoubtedly, other state laws that advance tax funds to parochial schools will be enacted subsequent to this compilation. Laws will

also be amended or deleted as a result of court decisions. Nonetheless, the data here should be helpful in keeping abreast of future developments.

5. ANALYSIS OF FEDERAL COURT DECISIONS

Decisions rendered in the cases concerning public aid to religious schools consist of the very thoughts and actions of our country's forefathers. The words of James Madison in his "Memorial and Remonstrance Against Religious Assessments" and of Thomas Jefferson in his "Bill for Establishing Religious Freedom" are repeatedly adduced and perpetuated by our federal courts. Because of these men the substance of the cases reported here in many ways surpasses the bounds of time.

Introduction to the Cases

The cases selected for analysis in this chapter were required to satisfy one or more of four criteria common to all cases on the subject of aid to religious schools. The criteria were that the case (1) be frequently cited by the courts when rendering a decision, (2) offer new direction and fresh thought with respect to future court decisions, (3) involve the question of public financial aid to religious schools or students, and (4) question the use of tax-supported schools for various religious activities.

Following this brief presentation, the cases are given in chronological order. An attempt was made to maintain the full flavor of each case but to reduce it to a point where the reader, after having read all cases, could see the established trend over the years.

The cases of *Bradfield v. Roberts* and *Quick Bear v. Leupp* are included because they are frequently cited as legal precedents for the practice of aiding religious schools. This is so regardless of the fact that *Bradfield* concerns a hospital, not a school, and the hospital was not officially under the authority of any religious sect. Similarly, in *Quick Bear* the money used to support a sectarian school was from private and not public funds.

Meyer v. Nebraska is significant as the foundation giving precedent to the case of *Pierce v. Society of Sisters.* In *Pierce* the Court made clear that a parent has the inherent right to direct the education of his children; he may send them to a private school of either a secular or sectarian character.

Cochran v. Louisiana State Board of Education is considered a landmark case because it established the child-benefit theory. Un-

der this logic, books and transportation designated *pro bono publico* have been allowed, despite simultaneous benefit to sectarian schools. The *Cochran* doctrine was present when the reimbursement to parents for the cost of transporting their children to religious schools was allowed in *Everson v. Board of Education.* The influence of *Cochran* was also felt when, in *Board of Education v. Allen,* the Court upheld the lending of textbooks to all (including parochial) children of the state.

In *Illinois ex rel. McCollum v. Board of Education,* the Court held it unconstitutional to use tax-supported school facilities for the purpose of teaching religion on a released-time basis. In *Zorach et al. v. Clausen,* released-time was held to be a constitutional practice where no tax-supported school facilities were used.

Engel et al. v. Vitale established that the "financial support" of the state through its public school system cannot be used to perpetuate a religious belief. Thus, the court held that the school could not be a forum for the purpose of reciting a state-adopted prayer. And in the case of *Abington School District v. Schempp* the Court again prohibited the use of a tax-supported school for the purpose of prayer or Bible reading. Equally significant here was the court's issuance of a constitutional standard for any law that might aid religions or religious schools.

Inclusion of *Cantwell v. Connecticut* was justified on the grounds that it opened the way for a citizen to sue *a state* for violation of the religious clause of the First Amendment.

Another case that opened new territory was *Flast et al. v. Cohen.* In *Flast* the Court held that a federal taxpayer has legal standing to sue where federal programs abridge the religious rights guaranteed by the First Amendment. Prior to *Flast* the road to suit had been blocked by a decision rendered in *Frothingham v. Mellon* where the court had held a federal taxpayer's interest to be "minute and indeterminable."

DiCenso v. Robinson, Jr., and *Johnson v. Sanders* were included because the logic used in these cases suggested that the "test" should be whether the government is excessively entangled with the affairs of religion. Both of these cases and *Lemon v. Kurtzman* involve secular educational service laws. *DiCenso* and *Lemon* are subjects of a recent United States Supreme Court decision.

The Cases

Bradfield v. Roberts

Bradfield v. Roberts does not deal directly with the question of using public funds for religious schools, since a hospital rather than a school was the object of litigation. Nevertheless, the decision is often pointed to as a precedent for lawful use of public monies for any religious purpose, and inclusion of the case is justified on this ground.

In 1897 the commissioners of the District of Columbia entered into an agreement with the directors of Providence Hospital in the city of Washington. Articles of the agreement provided that the hospital would erect "on the grounds of said hospital an isolating building or ward for the treatment of minor contagious diseases . . . without expense to said hospital . . . but paid out of an appropriation for that purpose contained in the District appropriation bill."[117] When suit was brought, the treasurer of the United States was named defendant, since he was to make payment to the hospital.

Bradfield, a District of Columbia citizen, complained that Providence Hospital was dominated by members of the Roman Catholic Church, and, as such, amounted to a religious society. Furthermore, Bradfield contended that if the agreement were carried out it would result in an appropriation of money by Congress to a religious society. Initially, an injunction was granted to Bradfield, but the defendant appealed, and the court of appeals reversed the decision. Bradfield appealed to the United States Supreme Court.

In presenting his own case, Bradfield advanced the argument that the contract, once consummated, would be "contrary to the article of the Constitution which declares that Congress shall make no law respecting a religious establishment."[118]

Mr. Justice Peckham, delivering the opinion of the Court, responded to Bradfield's argument by saying that the Constitution "prohibits the passage of a law 'respecting an establishment of religion'."[119] The justice observed that the Constitution is silent on the subject of a religious establishment and that Mr. Bradfield had used "a phrase which is not synonymous with that used in the Constitution."[120] Moreover, Justice Peckham noted that the hospital's articles of incorporation made no mention of the religious affili-

[117] Bradfield v. Roberts, 175 U.S. 291 at 293 (1899).
[118] *Ibid.*
[119] *Ibid.*, p. 297.
[120] *Ibid.*

ation of the officers. The fact that all the individuals who composed the corporation happened to be of the same faith could have no bearing. The charter, having been granted by Congress, was subject to the law of its being. Congress had, in the third section of the charter, reserved the right to amend, alter, or repeal it, "to remedy any abuse of the charter privileges."[121]

The Court found the hospital managed its business "in its own way, subject to no visitation, supervision, or control by any ecclesiastical authority whatever."[122] The judgment of the court of appeals was affirmed.

Quick Bear v. Leupp

On February 26 and 27, 1908, the United State Supreme Court heard its first case concerning the legality of using federal monies for the support of sectarian schools. At it turned out, the money used was part of a private fund, held in trust by the United States treasury. Despite the facts, the significance of the case lies in its use as a precedent for the legal use of *public* funds for religious purposes.

Prior to 1900 the United States Government had an established policy of contracting with numerous sectarian schools for education of Indians on the various reservations. "But in 1894 opposition developed against appropriating public moneys for sectarian education."[123] Accordingly, Congress established the policy of phasing out over the years that type of appropriation and decreed that the year of 1899 marked the "final appropriation for sectarian schools."[124] With this act the commissioner of Indian Affairs, Francis E. Leupp, was effectively barred from using additional public funds for the support of sectarian schools.

But in 1906 Commissioner Leupp was petitioned by 212 Sioux Indians of the Rosebud Agency, South Dakota, to use a *pro rata* proportion of an Indian trust fund for the education of their children in the St. Francis Mission, a Roman Catholic School. The trust fund mentioned was an amount of money set aside for the "support and maintenance of day and industrial schools, including erection and repairs of school buildings" for the Sioux Indians.[125] The fund was established in 1868 when the United States"

121*Ibid.*, p. 300.
122*Ibid.*, p. 291.
123Quick Bear v. Leupp, 210 U.S. 50 at 78 (1908).
124*Ibid.*
12515 *Stat.* 635 (1868).

made a treaty with the Sioux Indians, under which the Indians made large cessions of land and other rights.[126]

Reuben Quick Bear, Ralph Eagle Feathers, and Charles Tackett sought an injunction against such use of the funds on the grounds that "the spirit of the Constitution requires that the government 'shall make no appropriation whatever for education in any sectarian schools'."[127] An injunction was granted by the federal district court in the District of Columbia, but the defendant, Francis Leupp, appealed. The court of appeals reversed the decision, and plaintiffs appealed to the United States Supreme Court.

In delivering the Court's opinion, Chief Justice Fuller noted, first, that the money in question was private, not public; second, that a *pro rata* proportion of the money for support of a sectarian school was requested by the Indians; and finally, that the Constitution precluded any law that would prohibit the free exercise of religion. In conclusion the Chief Justice said:

> . . . it seems inconceivable that Congress shall have intended to prohibit them from receiving religious education at their own cost if they desire it; such an intent would be one to prohibit the free exercise of religion amongst the Indians, and such would be the effect of the construction for which the complainants contend.[128]

Meyer v. Nebraska

Robert T. Meyer was an instructor in a parochial school maintained by the Zion Evangelical Lutheran Congregation. In May 1920, the district court for Hamilton County, Nebraska, found Meyer guilty of the crime of teaching a foreign language to a child not yet educated past the eighth grade. Meyer appealed, and the state supreme court affirmed the judgment of conviction. Again Meyer appealed; this time his appeal was heard by the United States Supreme Court.

Meyer's case did not involve the expenditure of public revenues for sectarian schools, but it did establish a principle found in the fabric of other, more relevant cases: the state may not infringe on the constitutionally guaranteed liberties by which parents guide the education of their young.

The state law that forbade the teaching of a foreign language read in part:

> Section 1. No person, individually or as a teacher, shall, in any private,

[126]Quick Bear v. Leupp, 210 U.S. 50 at 80 (1908).
[127]*Ibid.*, p. 81.
[128]*Ibid.*, p. 82.

denominational, parochial or public school, teach any subject to any person in any language other than the English language.
Section 2. Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade. . . . [129]

The purpose of the statute was to make English the mother tongue of all children in the state. This was necessary, the state contended, because the "legislature had seen the baneful effects of permitting foreigners who had taken residence in this country, to rear and educate their children in the language of their native land.[130]

Meyer demurred to the charge on grounds the act interfered with the teacher's right to teach, the child's right to acquire knowledge, and the parent's right to control the education of their children—all guaranteed by the Fourteenth Amendment: "No state shall . . . deprive any person of life, liberty, or property without due process of law."[131]

Mr. Justice Reynolds said the opinion of the Court was that "mere knowledge of the German language cannot reasonably be regarded as harmful."[132] Furthermore, the Court held that the right of plaintiff "to teach and the right of parents to engage him so to instruct their children . . . are within the liberty of the Amendment."[133] The judgment of Nebraska's state supreme court had to be reversed, the Court said, because "the protection of the Constitution extends to all—to those who speak other languages as well as to those born with English on the tongue."[134]

Frothingham v. Mellon

The practical effect of this case, decided in 1923, was to bar, for the next forty-five years, any suit that questioned the legality of federal appropriations for any purpose. Therefore, during those years there was no legal standing in a federal court to challenge federal programs that provided monies for parochial schools.

In 1921 the Maternity Act was passed by Congress. Briefly, the act sought to use tax-appropriated funds to establish programs within the states that would "reduce maternal and infant mortality and protect the health of mothers and infants."[135] Funds were to

[129]Meyer v. Nebraska, 262 U.S. 390 at 397 (1923).
[130]*Ibid.*, p. 398.
[131]*United States Constitution*, Amendment XIV.
[132]Meyer v. Nebraska, 262 U.S. 390 at 400 (1923).
[133]*Ibid.*
[134]*Ibid.*, p. 401
[135]Frothingham v. Mellon, 262 U.S. 447 at 479 (1923).

be apportioned among the states that agreed to accept and comply with the provisions of the act.

Frothingham alleged that the effect of the statute would be "to take her property, under the guise of taxation, without due process of law."[136] She complained that the act would increase the burden of her future taxes. Beyond that, the Court was not entirely clear as to the exact nature of her complaint but took it as a challenge to the legal execution of a federal "appropriation act, on the ground that it is invalid and will result in taxation for illegal purposes."[137]

Frothingham sought an injunction in the supreme court of the District of Columbia; that court dismissed Frothingham's bill. Next, the plaintiff appealed to the court of appeals of the District of Columbia; there the judgment of the lower court was affirmed. Finally, Frothingham appealed to the United States Supreme Court. Justice Sutherland gave the Court's opinion:

> His (the taxpayer's) interest in the moneys of the treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation of any payment out of the funds so remote, fluctuating, and uncertain that no basis is afforded for an appeal to the preventive powers of a court of equity.[138]

The Court saw that if one taxpayer could litigate such a case, then every other taxpayer could do likewise for every appropriations act. Thus, the Court said that not only must a taxpayer be able to show that he would suffer "in common with people generally" but that he would suffer directly if the act were allowed. The decree of the court of appeals was affirmed.

Pierce v. Society of Sisters

The decision rendered by the Court in this case also applied to the twin case of *Pierce v. Hill Military Academy*. The cases came before the United States Supreme Court by appeal when the United States District Court of Oregon enjoined that state from enforcing a statute requiring children to attend public schools. Following the doctrine handed down in *Meyer v. Nebraska*, the Supreme Court made it clear that parents have a right to direct the education of children under their control.

Oregon law required every person having control of children between the ages of eight and sixteen years

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136 *Ibid.*, p. 480.
137 *Ibid.*, p. 486.
138 *Ibid.*, p. 490.

> . . . to send him "to a public school for the period of time a public school shall be held during the current year" in the district where the child resides . . . [139]

One appellee, the Society of Sisters, was an incorporated orphanage operated by the Roman Catholic Church. The society maintained that the Oregon enactment effectively interfered with "the right of parents to choose schools where their children will receive appropriate mental and religious training," and the right of schools and teachers to pursue their profession.[140] Furthermore, unless the injunction was sustained, the corporation's business would be destroyed.

The other appellee, Hill Military Academy, was an incorporated school for boys, secular in character. The academy alleged that the Oregon law contravened the corporation's rights guaranteed by the Fourteenth Amendment.

The United States Supreme Court affirmed the lower court's decision, saying:

> Under the doctrine of *Meyer v. Nebraska* . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control . . . The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[141]

Cochran v. Louisiana State Board of Education

In 1928 Louisiana enacted a law that compelled the state board of education to provide "school books for school children free of cost."[142] The books were in fact to be lent to all the children of the state, including children of private (secular or sectarian) schools. The cost was to be borne out of state tax funds.

Cochran objected and sought an injunction on grounds that supplying books to private schools amounted to taking his property without due process of law, a violation of the Fourteenth Amendment. No First Amendment issue was raised.

The state maintained that the purpose of the act was to aid children and not schools. "It was for [the children's] benefit and the resulting benefit to the state that the appropriations were made."[143] The state was persistent in its view that schools did not benefit

[139]Pierce v. Society of Sisters, 268 U.S. 510 at 530 (1925).
[140]*Ibid.*, p. 532.
[141]*Ibid.*, p. 535.
[142]Cochran v. Louisiana State Board of Education, 281 U.S. 370 at 374 (1930).
[143]*Ibid.*, p. 375.

from the appropriations. "[The schools] obtain nothing from them, nor are they relieved of a single obligation because of them. The school children and the state alone are the beneficiaries."[144] It was on this contention that the United States Supreme Court affirmed the lower court's decision to refuse an injunction. Mr. Chief Justice Hughes delivered the opinion of the Court:

> Viewing the statute as having the effect thus attributed to it, we can not doubt that the taxing power of the state is exerted for a public purpose. The legislature does not segregate private schools or their pupils, as its beneficiaries, or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded. Judgment affirmed.[145]

With that brief statement the court gave birth to the so-called child benefit theory.

Cantwell v. Connecticut

Connecticut had a statute that held, in essence, that no person could solicit for any religious cause unless that person received permission from the secretary of the Public Welfare Council of the state. The secretary's purpose was to determine whether the solicitor's religious assignment was a bona fide one, or fraudulent. Cantwell at first received permission, but later when that permission was revoked he continued to solicit. The trial court and the supreme court of Connecticut held Cantwell in violation of that state's statute. On appeal and writ of *certiorari*, the case came before the United States Supreme Court.

Cantwell demurred to the charge by contending the statute under which he was convicted was offensive to the Fourteenth Amendment: it inhibited his liberty to practice his religion and to speak freely, without due process of law.

The Supreme Court not only held Cantwell's contention to be correct, saying, "the fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment."[146] But the Court added this significant statement:

> The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.[147]

144 *Ibid.*
145 *Ibid.*
146 Cantwell v. Connecticut, 310 U.S. 296 at 303 (1940).
147 *Ibid.*

Therefore, the salient imperative of this decision was that the religious clause of the First Amendment was, for the first time, held binding on the states via the Fourteenth Amendment. That is, the Court ruled that not only Congress but the states as well are prohibited from making a law that "establishes or prohibits a religion." Whereas Cantwell had complained of a violation of Fourteenth Amendment rights, the United States Supreme Court went further, saying that Cantwell's First Amendment rights were also violated. Also, by reversing the lower court's opinions, it is fair to say the Supreme Court held that citizens could now sue a state for violation of First Amendment rights.

Everson v. Board of Education

This was the first case reaching the Supreme Court concerning a state statute that provided support for parochial schools and the religious clause of the First Amendment.

New Jersey enacted a law that would reimburse parents for the cost of transporting their children to public or parochial schools, as long as the schools were not operated for a profit. Everson objected to the law; first, because it allegedly took his property and bestowed it for private usage without due process of law—a violation of the Fourteenth Amendment; and second, because the law would use tax money for the support of religious schools, thus establishing certain religions—a violation of the First Amendment. A New Jersey state court held that the enactment violated the state constitution, but the New Jersey Court of Appeals reversed this decision. The case was then appealed to the United States Supreme Court.

To Everson's first charge the Court said it was not the intention of the law to aid private persons because the law was passed to satisfy a public need. The Court agreed that the result was furtherance of both private and public goals, but held that this was merely coincidental and not the intent of the law. Therefore, due process was not denied by the New Jersey statute. Relying on the child-benefit theory established in *Cochran v. Louisiana State Board of Education*, the Court contended that the aid given was intended as a safety measure for the children of the public.

To Everson's second charge, the Court first reviewed the history surrounding the First Amendment and then called into view the meaning of that Amendment:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church.

> Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."[148]

Notwithstanding such words, the Court insisted the New Jersey statute had not made the slightest breach in the wall between religion and government. Moreover, the Court held that to inhibit New Jersey in its attempt to extend to its citizens the safety provided by the enactment would preclude the neutral stance required by the First Amendment. The First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."[149]

In its decision upholding the New Jersey statute, the High Court was divided five to four. The arguments of dissenting justices have since proved to be equal to the decision itself in significance. For example, in dissenting, Justice Jackson said that the undertones of the Court's logic stood in stark contrast to its conclusion. He likened the court to "Julia, who, according to Byron's reports, 'while whispering "I will ne'er consent,"—consented'."[150] Taking sharp issue with the Court's general welfare or child-benefit theory, Justice Jackson observed:

> Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school is indistinguishable to me from rendering the same aid to the Church itself.[151]

In a separate dissent, Justice Rutledge questioned the Court's logic, in that it sustained public payment for small concessions to religious schools while it made wholly private in character the larger things without which the smaller could have no meaning or use."[152] Noting that the *Cochran* decision had made room for the decision in this case, Justice Rutledge said that the now two decisions would make further room for a third. "Thus with time the

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[148]Everson v. Board of Education, 330 U.S. 1 at 15 (1947).
[149]*Ibid.*, p. 18.
[150]*Ibid.*, p. 19.
[151]*Ibid.*, p. 24.
[152]*Ibid.*, p. 51.

most solid freedom steadily gives way before continuing corrosive decision."[153]

Illinois ex rel. McCollum v. Board of Education

The plaintiff, Vashti McCollum, petitioned the court to order the board of education of Champaign County, Illinois, to:

> . . . adopt and enforce rules and regulations prohibiting all instruction in and teaching of religious education in all public schools . . . and in all public school houses and buildings in said district when occupied by public schools.[154]

The board in Champaign County had an agreement whereby several denominations could use part of a school day (released-time) to instruct students who volunteered for such instruction on matters of their faith. The facilities of public schools were used for religious instruction. Those students not desiring religious instruction continued to pursue their secular education.

McCollum contended that the board, by allowing religions to use the tax-supported public school system, was promoting religion and violating the First Amendment. After the Illinois state courts denied relief to the plaintiff, the case reached the United States Supreme Court on appeal.

Justice Black gave the Court's decision: "This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith."[155]

The Court relied heavily on the views expressed by both the majority and minority in the *Everson* case. After repeating its definition of the First Amendment, first given in *Everson, the Court said:*

> . . . the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the Everson Case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable.[156]

The Court thus reversed the supreme court of Illinois.

Zorach et al. v. Clausen

In a six-to-three decision the United States Supreme Court upheld the constitutionality of a New York City program that allowed students, upon the written request of their parents, to attend re-

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[153] *Ibid.*, p. 29.
[154] Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203 at 205 (1948).
[155] *Ibid.*, p. 210.
[156] *Ibid.*, p. 212.

ligious courses given outside the school building. As in *Illinois ex rel. McCollum*, students not attending religious classes were confined to the school to pursue secular activities. But, unlike *McCollum*, the program was conducted outside of the school and wholly at the expense of the participating religions.

Nevertheless, plaintiffs contended that the tax-supported school system manipulated its schedule to accommodate religions, and this was in violation of the First Amendment. The New York State Court of Appeals sustained the law, and the case reached the United States Supreme Court on appeal. The High Court said:

> Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person.[157]

The three justices who dissented each made the point that New York's law did indeed use a "secular institution to force religion" on students. Mr. Justice Jackson said in one place that the school "serves as a temporary jail for a pupil who will not go to church. It takes more subtlety of mind than I possess to deny that this is governmental constraint in support of religion."[158] He summed up in this manner:

> It is possible to hold a faith with enough confidence to believe that what should be rendered to God does not need to be decided and collected by Caesar.[159]

Engel et al. v. Vitale

A New York State Board of Regent's simple prayer marked the turn of events leading to this case. The prayer, denominationally neutral and its observance voluntary, read, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."[160]

Plaintiffs challenged the state law that allowed the public schools to be used for this religious purpose; they also contended that recitation of the prayer violated the religious clause of the First Amendment. No relief was granted to the plaintiffs by the trial court or by the New York Court of Appeals. But on *certiorari*, the United States Supreme Court reversed the lower courts' decisions, saying:

> When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon

[157]Zorach *et al.* v. Clausen, 343 U.S. 306 at 314 (1952).
[158]*Ibid.*, p. 324.
[159]*Ibid.*, p. 325.
[160]Engel *et al.* v. Vitale, 370 U.S. 421 at 422 (1962).

religious minorities to conform to the prevailing officially approved religion is plain.[161]

Mr. Justice Douglas, in a separate concurring opinion, wrote:

> The point for decision is whether the Government can constitutionally finance a religious exercise . . . I think it is an unconstitutional undertaking whatever form it takes.[162]

Justice Douglas had been one of the majority in the five-to-four *Everson* decision that sustained the constitutionality of reimbursing parents for the cost of transporting their children to parochial schools. Worth noting, therefore, is a comment made by Justice Douglas in this concurring opinion:

> The Everson Case seems in retrospect to be out of line with the First Amendment. Its result is appealing as it allows aid to be given to needy children. Yet by the same token, public funds could be used to satisfy other needs of children in parochial schools—lunches, books, and tuition being obvious examples.[163]

Abington School District v. Schempp

The *Schempp* case concerned a Pennsylvania statute requiring the Bible to be read, without commentary, and the Lord's Prayer to be recited at the start of each school day. Participation by students and teachers was not mandatory. Suit was brought in the District Court for the Eastern District of Pennsylvania in an effort to enjoin the enforcement of the statute. The district court granted relief to the plaintiffs. Upon appeal by the school district, the United States Supreme Court affirmed the decision of the lower court.

The decision rendered here also applies to a companion case, *Murray v. Curlett.* In *Murray* the Board of Commissioners of Baltimore City, Maryland, had a rule similar to that involved in *Schempp.* When suit was brought in a Maryland state court, the rule was sustained. On appeal, the Maryland Court of Appeals upheld the trial court. After granting *certiorari,* the United States Supreme Court reversed the decisions of the lower courts.

The Court in *Schempp* first reviewed the cases of the preceding twenty years in which the establishment clause of the First Amendment had been considered. On finding that the court had consistently ruled against the violation of that clause, the court then laid down the following rule:

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[161] *Ibid.,* p. 431.
[162] *Ibid.,* p. 437.
[163] *Ibid.,* p. 443.

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[164]

Further, the Court made clear that it was not acceptable to argue that the encroachments made here on the First Amendment were small ones. "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent, and in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties'."[165]

In a separate opinion, Justice Douglas concurred with the Court, saying that, "through the mechanism of the State, all of the people are being required to finance a religious exercise that only some of the people want and that violates the sensibilities of others."[166] In conclusion, Justice Douglas made his oft-quoted remarks concerning the financing of religious schools with public funds.

> The most effective way to establish any institution is to finance it; and this truth is reflected in the appeals by church groups for public funds to finance their religious schools. Financing a church either in its strictly religious activities or in its other activities is equally unconstitutional, as I understand the Establishment Clause. Budgets for one activity may be technically separable from budgets for others. But the institution is an inseparable whole, a living organism, which is strengthened in proselytizing when it is strengthened in any department by contributions from other than its own members.
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> Such contributions may not be made by the State even in a minor degree without violating the Establishment Clause. It is not the amount of public funds expended, as this case illustrates, it is the use to which public funds are put that is controlling. For the First Amendment does not say that some forms of establishment are allowed; it says that "no law respecting an establishment of religion" shall be made. What may not be done directly may not be done indirectly lest the Establishment Clause become a mockery.[167]

Board of Education v. Allen

This case centered around a New York statute that required local public school authorities to lend textbooks, free of charge, to all (including parochial) students in grades seven through twelve. Plaintiffs sought to enjoin Commissioner of Education James E. Allen from "apportioning state funds to school districts for the pur-

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[164] Abington School District v. Schempp, 374 U.S. 203 at 222 (1963).
[165] *Ibid.*, p. 225.
[166] *Ibid.*, p. 228.
[167] *Ibid.*, pp. 229-230.

chase of textbooks to be lent to parochial students."[168] They felt that this practice was in violation of the First Amendment, and it was found to be so by the trial court. But upon appeal, the New York Court of Appeals reversed the judgment. Plaintiffs then appealed to the United States Supreme Court, where the ruling of the New York Court of Appeals was upheld.

The Supreme Court repeated the test that was established in *Schempp*. The Court insisted that when this test is applied to the present case the New York law has " 'a secular legislative purpose and a primary effect that neither advances nor inhibits religion'."[169]

Perhaps equally significant, the Court maintained that the plaintiffs had not established that "processes of secular and religious training [in parochial schools] are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion."[170]

As one of three dissenting justices, Justice Black contended:

> It requires no prophet to foresee that on the argument used to support this law others could be upheld providing for state or federal government funds to buy property on which to erect religious school buildings or to erect the buildings themselves, to pay the salaries of the religious school teachers, and finally to have the sectarian religious groups cease to rely on voluntary contributions of members of their sects while waiting for the Government to pick up all the bills for the religious schools.[171]

Justice Black, with Justice Douglas, had been among the majority in *Everson*, where a law authorizing reimbursement to parents for the cost of transporting their children to sectarian schools was sustained. Having previously supported one form of parochial aid, both approached their seemingly disparate positions on the fundamental basis that books advance ideologies, whereas, pragmatically speaking, transportation does not. Justice Douglas noted that initial selection of books would be by the parochial schools, and that even though final approval would come from the local board of education, "powerful religious-political pressures will therefore be on the state agencies to provide the books that are described.[172] This is so, Justice Douglas contended, because the boards are elected in New York.

Justice Douglas concluded by saying that even if his contentions

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[168]Board of Education v. Allen, 392 U.S. 236 at 240 (1968).
[169]*Ibid.*, p. 243.
[170]*Ibid.*, p. 248.
[171]*Ibid.*, p. 253.
[172]*Ibid.*, p. 265.

were wrong, the alternative is to introduce secularism into the sectarian schools where the long-range effect would be state domination of the church. Therefore, either way "the principle of separation of church and state, inherent in the Establishment Clause of the First Amendment, is violated by what we today approve."[173]

Flast et al. v. Cohen

Plaintiffs sought an injunction in the District Court for the Southern District of New York against the use of Elementary and Secondary Education Act of 1965 funds to purchase textbooks and other materials for parochial schools. The complaints alleged that such use of federal funds violated their rights under the religious clause of the First Amendment. Relying heavily on the decision rendered in *Frothingham,* the district court ruled that the plaintiffs lacked proper standing to bring suit. Flast appealed his case to the United States Supreme Court, which reversed the lower court's decision.

In *Frothingham,* the plaintiff argued unsuccessfully that congressional action to establish a maternity-care program injured her because of the resulting higher taxes she was forced to pay. *Frothingham* failed because the Court said there is no statute or constitutional provision that purports to protect citizens against increased taxes; therefore, there could be no nexus between the status of a taxpayer and the infringement alleged. However, a necessary connection was established by Flast since he was able to show that taxes, if used to support religious schools, would specifically transgress the limits of a constitutional guarantee—religious freedom. The Court stated:

> Consequently, we hold that a taxpayer will have standing . . . to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power.[174]

In this case the constitutional provision that restricted congressional spending power was the First Amendment. That amendment has a gloss on it that disallows spending where the religious clause would be violated.

The Court declined to express a viewpoint on the merits of the appellant's claim that federal spending for the advantage of parochial schools is unconstitutional; rather it only granted that the

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[173] *Ibid.,* p. 266.
[174] Flast *et al.* v. Cohen, 392 U.S. 83 (1968).

plaintiffs had a constitutional right to make such a claim in a federal court.

In a separate concurring opinion, Justice Douglas contended that, on the federal level, there has been an attempt to block review of laws that would aid parochial schools. Therefore, he suggested the courts should stand in easy availability, for they may well be the citizen's only means for redress. Justice Douglas further stated that "the mounting federal aid to sectarian schools is notorious and the subterfuges numerous."[175] He used the following as examples:

> Tuition grants to parents of students in church schools is considered by the clerics and their helpers to have possibilities. The idea here is that the parent receives the money, carries it down to the school, and gives it to the priest. Since the money pauses a moment with the parent before going to the priest, it is argued that this evades the constitutional prohibition against government money for religion! This is a diaphanous trick which seeks to do indirectly what may not be done directly.
>
> Another one is the "authority." The state may not grant aid directly to church schools. But how about setting up an authority—like the Turnpike Authority? The state could give the money to the authority which, under one pretext or another, could channel it into the church schools.
>
> Yet another favorite of those who covet sectarian subsidies is "child benefit." Government may not aid church schools, but it may aid the children in the schools. The trouble with this argument is that it proves too much. Anything that is done for a school would presumably be of some benefit to the children in it. Government could even build church school classrooms, under this theory, because it would benefit the children to have nice rooms to study in.[176]

Lemon v. Kurtzman

Under this suit, brought before the district court of Pennsylvania, Lemon and other plaintiffs sought to enjoin the expenditure of state funds under the Pennsylvania Nonpublic Elementary and Secondary Education Act. The act permits the superintendent of public instruction to enter into contracts with nonpublic (including parochial) schools for the purchase of secular educational services. Purchases are limited to cost of teachers' salaries, textbooks, and instructional materials for the subjects of mathematics, physical science, modern foreign languages, and physical education. Tax funds are taken only from the proceeds of horse racing and harness racing in the state.

Plaintiffs alleged that the act violated the establishment clause of the First Amendment. Specifically, Lemon charged that (1) the act has as its purpose and primary effect the advancement of religion,

[175] *Ibid.*, p. 113.
[176] *Ibid.*

(2) the vast majority of recipients of aid under the act are sectarian schools; and (3) the true intent of the Pennsylvania legislature was to aid religious schools.

Two of the three judges presiding in the court disagreed with the plaintiffs, saying, "we believe that the purpose of the Education Act can be found clearly on its face.[177] The court noted that Pennsylvania lawmakers had recognized the potential financial burden on the public treasury if nonpublic schools should close. Moreover, the court, quoting from *Everson*, said: "The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason . . . to say a legislature has erroneously appraised the public need."

As to the plaintiffs' charges that the true purpose of the act was to aid religion and that the legislature's original intent should be examined, the court quoted from Justice Frankfurter in *McGowan v. Maryland:* "Inquiry into the hidden motives which may move [a legislature] to exercise a power constitutionally conferred upon it is beyond the competency of the courts."[178]

Finally, relying on the doctrine of neutrality considered in *Board of Education v. Allen,* the court admitted that the line is not easy to draw:

> However, we believe the Education Act is consistent with neutrality towards religion and comes within the permissible limits and spirit of the nonestablishment principle. Consequently, we will dismiss the plaintiffs' complaint under the establishment clause.[179]

Chief Circuit Judge Hastie dissented. "The state buys no services and the school sells none," said Judge Hastie; "the artificial characterization of this procedure as 'contracting for secular education services' does not help solve our constitutional problem."[180] Seeing the direct financing of religious enterprise as unconstitutional, Judge Hastie said, "Constitutionally, such subsidizing of a religious enterprise is not essentially different from a payment of public funds into the treasury of a church."[181] Nor could Justice Hastie see any difference between financing school activities of a church and financing other church-related activities such as hospitals, charities, and homes for the aged—all relieve the state of addi-

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[177]Lemon v. Kurtzman, 310 F. Supp. 35 at 45 (1969).
[178]McGowan v. Maryland, 366 U.S. 420 at 469 (1961).
[179]Lemon v. Kurtzman, 310 F. Supp. 35 at 48 (1969).
[180]*Ibid.*, p. 50.
[181]*Ibid.*, p. 51.

tional expenditures. In conclusion, Justice Hastie insisted the act requires the state to participate in religious affairs. "I am unable to avoid the conclusion that the state undertaking authority by Act 109 would thus intolerably involve the state in the realm of the sectarian."[182]

Denied relief by the district court, the plaintiffs appealed the decision to the United States Supreme Court. Because of the similarity of this case to another current case, the Court handled both cases in the same written decision. The Court's decision will be given following a description of the related case.

DiCenso v. Robinson, Jr.

In 1969, the Rhode Island legislature enacted Public Law 246, entitled the Salary Supplement Act. In the language of the statute, the purpose of the act was "to assist nonpublic schools to provide salary scales which will enable them to retain and obtain teaching personnel who meet recognized standards of quality." Money was appropriated to pay up to 15 percent of the salaries of teachers of secular subjects in nonpublic schools.

Plaintiffs brought suit, alleging that the primary beneficiaries of the act—Catholic schools—have as a goal the propagation of the Catholic faith; therefore, the act establishes a religion. In addition, plaintiffs claimed that compulsory taxation in aid of religion violated the free exercise clause of the First Amendment. Plaintiffs sought, in a three-judge Rhode Island district court, a declaration that the act violated the establishment and free exercise clauses of the First Amendment.

Defendants insisted the act aided teachers, not schools, and urged the court to focus solely on the major premise that the act gave aid only to teachers of secular subjects. But the court labeled such a narrow perspective as "unrealistic" and averred that under this test "sophisticated bookkeeping could pave the way for almost total subsidy of a religious institution by assigning the bulk of the institution's expenses to 'secular' activities."[183]

Before considering the plaintiffs' charges, the court first examined the act and the governmental regulations designed for its implementation. Next the court reviewed the nature of the crisis leading to the act and found that (1) only Catholic schools faced a financial crisis; (2) the crisis stemmed from the change from religious to lay teachers in Catholic schools; (3) the present ratio of 2

[182]*Ibid.*, p. 53.
[183]DiCenso v. Robinson, Jr., 316 F. Supp. 120 (D. C., Rhode Island, 1970).

religious for 1 lay teacher was expected soon to become a 1 to 1 ratio, and, within five years, to reflect an all lay staff; and (4) in view of these facts, only "substantially greater appropriations subsidizing substantially greater percentages of the salaries of lay teachers" would permit the act to achieve its objective—to enable nonpublic schools to compete effectively for qualified teachers.[184]

Finally, the court admitted evidence showing the interweaving financial relationship between the Catholic schools' religious and pedagogical missions. Citing from the Catholic *Handbook of School Regulations* that "[r]eligious formation is not confined to formal courses; nor is it restricted to a single subject area," the court found the diocesan school system to be an integral part of the religious mission of the Catholic church, and termed the school an "essentially religious enterprise."[185] In concluding this portion of the examination, the court said:

> . . . we find that the statute will have the significant if temporary secular effect of aiding the quality of secular education in Rhode Island's Roman Catholic elementary schools. On the other hand, we think it equally clear that the Act gives significant aid to a religious enterprise.[186]

Turning now to the plaintiffs' charges, the court quickly dismissed the free exercise claim, since no evidence had been introduced "to show the coercive effect of the enactment as it operates against [them] in the practice of [their] religion.[187] Only the charge of violation of the establishment clause remained to be examined.

Plaintiffs quoted from the test established in the *Everson* case that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions" and averred that the Rhode Island act ran wide of this stricture. The court responded by saying that this test could not be used since it did not even prohibit aid to religious institutions in the *Everson* case.

With the *Everson* test dismissed, plaintiffs built their argument around the test relied on in *Board of Education v. Allen:*

> The test may be stated as follows: what are the purposes and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of the legislative power as circumscribed by the Constitution.[188]

As to the first part of this test, the court held that the purpose of

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184*Ibid.*, p. 116.
185*Ibid.*, pp. 116-117.
186*Ibid.*, p. 118.
187*Ibid.*
188Board of Education v. Allen, 392 U.S. 236 at 243 (1968).

the act was clearly stated in the statute—"to provide a quality education for all Rhode Island youth, those in public and non-public schools alike," and that certainly this was a legitimate legislative concern. Attention now turned to the "primary effect" part of the test. The contestants argued over whether the effect of the act primarily aided the religious or secular mission of the Catholic schools. But the court cut through this, saying,

> . . . as we have already noted in our findings, the Act has two significant effects: on the one hand, it aids the quality of secular education; on the other, it provides support to a religious enterprise. Judicial efforts to decide which of these effects is "the primary effect" . . . are likely to be no more satisfactory than efforts to rank the legs of a table in order of importance.[189]

Not satisfied with either the test used in *Everson* or that in *Allen*, the court turned to the logic enunciated by Chief Jusice Warren Burger in *Walz v. Tax Commissioner of New York City*, a case that upheld New York's religious property tax exemption law. There Justice Burger observed that the test was whether the statute fosters "excessive entanglement" between government and religious institutions.[190]

In the words of the Chief Justice:

> The questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards . . . [191]

At this point the court referred to its earlier examination of regulations designed to implement the Rhode Island act and found that the statute significantly limited the internal freedom of parochial schools. Commenting on the necessary restrictions attached to direct aid, the court noted that should such aid be allowed, the church's victory over the establishment clause would mean the abandonment of its rights under the free exercise clause. In conclusion the court said:

> In short, we see as the necessary effects of the kind of legislation involved here not only substantial support for a religious enterprise, but also the kind of reciprocal embroilments of government and religion which the First Amendment was meant to avoid. We therefore hold that the Salary

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189DiCenso v. Robinson, Jr., 316 F. Supp. at 119 (1970).
190Walz v. Tax Commissioner of New York City, 38 U.S. L. W. 4347 (1970).
191*Ibid.*, p. 4350.

Supplement Act results in execessive government entanglement with religion and thus violates the Establishment Clause of the First Amendment.[192]

The case was appealed to the United States Supreme Court, and on June 28, 1971, the Court rendered its decision on this and the *Lemon* case discussed previously.

By an 8-0 decision on the *Lemon* case (Justice Marshall took no part in the case), the Court ruled that Pennsylvania's Nonpublic Elementary and Secondary Education Act was unconstitutional. By at 8-1 vote on *DiCenso* (Justice White dissented), the Court held Rhode Island's Salary Supplement Act was unconstitutional.

On a third related case also decided at the same time, the Court, by a 5-4 decision, upheld the constitutionality of The Higher Education Facilities Act of 1963, which provides federal construction grants for college and university facilities. The case, *Tilton v. Richardson,* challenged the constitutionality of construction assistance to church-related colleges in Connecticut.[193]

Justice White's dissent in *DiCenso* took three forms. First, White noted that the Court held Rhode Island could not use taxes to pay the salaries of nonpublic teachers of secular subjects because of the possibility of teachers inserting religious dogma into nonreligious subjects. The Court's failure to show that such practices actually existed meant, White said, that the ruling was made on a hypothetical case.

Justice White's second criticism suggested that the Court had created "an insoluble paradox" by ruling that Rhode Island's regulations for ensuring the secular use of tax monies amounted to "excessive entanglement" of state and church affairs. White reasoned that the Court had held, in effect, that if religion is taught, no taxes may be used. The opposite of that logic would suggest that if religion were not taught, taxes could be used. Yet, said White, when the state expects a promise from the church-supported school that no religion will be taught, it then becomes entangled in the "no entanglement" aspect of the Court's establishment clause jurisprudence.

Third, White contended that if the Court was correct in overturning the church-assistance laws of Rhode Island and Pennsylvania, then it was surely incorrect to sustain the church-assistance

[192]DiCenso v. Robinson, Jr., 316 F. Supp. at 122 (1970).
[193]Tilton v. Richardson, 91 S.Ct. 2091 (1971).

law in the Connecticut case. Nevertheless, White did not dissent in the Connecticut case, but four of his Fellow Justices (Douglas, Black, Marshall, and Brennan) did, thereby agreeing with White that the Court was indeed incorrect in upholding the appellee in *Tilton*.

Chief Justice Burger, in delivering the majority opinion, insisted that analyses of such cases fall within three considerations developed from cases over the years: (1) Does the statute have a secular legislative purpose? (2) Does the statute effectively neither advance nor inhibit religion? and (3) Does the statute "excessively entangle" government and religion?[194]

In the Pennsylvania and Rhode Island cases, efforts to understand the legislative purpose and rationale failed to establish any intent to advance religion. Therefore, the third consideration, "excessive entanglement," became of paramount importance. Justice Burger said, "The cumulative impact of the entire relationship arising under the statutes in each state involves excessive entanglement between government and religion."[195]

In reviewing the Rhode Island statute, Justice Burger insisted that salaries to parochial school teachers bring "excessive entanglement" into play. In its review of the statute, the Court recognized the substantially different "ideological character" between books and teachers. Continuing, Justice Burger said, "The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities . . . most of the lay teachers are of the Catholic faith."[196] While Justice Burger did not question bad faith on the part of parochial school teachers, he did recognize the difficulty of "remaining religiously neutral." Parochial school teachers with the best of intentions would find circumstances in which total separation of secular teaching and religious dogma would be impossible. Moreover, the Rhode Island legislature built comprehensive controls into the statute that required continuous state surveillance insuring First Amendment constitutionality. However, as Justice Burger pointed out, "Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs . . . these prophylactic contacts will involve excessive and enduring entanglement between state and church."[197]

Surveillance of teachers and inspection of school records and re-

[197] *Ibid.*
[194] Lemon v. Kurtzman and DiCenso v. Robinson, 91 S. Ct. 2111 (1971).
[195] *Ibid.*, p. 2112.
[196] *Ibid.*, p. 2114.

ligious content of programs are fraught with the sort of entanglement that the Constitution forbids."[198]

The Pennsylvania statute, strangled with the same constitutional entanglement as the Rhode Island statute, that is, salaries to parochial school teachers and continuing surveillance and monitoring of school programs, also provides financial aid directly to parochial schools. It is obvious, said Justice Burger, that such cash grants require continuing surveillance and monitoring of school programs, creating "an intimate and continuing relationship between church and state."[199]

In calling attention to a "broader base of entanglement," Justice Burger emphasized "the divisive political potential" of the statutes. Partisans of aid to religious schools will promote and champion "political action to achieve their goals." Others will oppose on the basis of constitutional, religious, or other reasons. Pragmatically, political candidates will be forced to choose which side to take, and voters may align according to religious faith. According to Justice Burger, the potential for "political fragmentation and divisiveness on religious lines is thus likely to be intensified."[200]

Continuing, Chief Justice Burger said:

> Taxpayers generally have been spared vast sums by the maintenance of these educational institutions by religious organizations, largely by gifts of faithful adherents. The merit and benefits of these schools, however, are not the issue before us in these cases. The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses.[201]

The strength of these cases and perhaps an indication of decisions yet to come are found in the detailed concurring opinions of Justices Brennan, Douglas, and Black.

In concurring opinions Justices Brennan and Douglas (including Justice Black) took great care to explain their rationale on four significant issues: (1) how direct aid to religious organizations differs from tax exemptions for churches, (2) how direct aid differs from child-benefits, (3) why direct aid cannot be allowed under the public relief theory, and (4) why the state through direct aid cannot claim to assist the secular as opposed to the sectarian function of a religious body. Each of these points will be succinctly reviewed.

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198 *Ibid.*, p. 2115.
199 *Ibid.*
200 *Ibid.*, p. 2116.
201 *Ibid.*, p. 2117.

Direct Aid and Tax Exemptions. Justice Brennan cut through this issue by quoting extensively from *Walz v. Tax Commission:* "[T]he symbolism of tax exemption is significant as a manifestation that organized religion is not expected to support the state; by the same token the state is not expected to support the church."[202]

Direct Aid and Child Benefits. Justice Brennan first recounted the forms of assistance previously allowed under the theory that aid went to children and parents but not to the institution. Then, he introduced the district court's finding that in Roman Catholic schools secular and sectarian education is in theory and practice "inextricably intertwined." "Finally, he explained that direct subsidies, unlike child-benefits, go to the schools, thus perpetuating the church/school body *en masse* to insure the existence of a religion. "[W]e cannot blink the fact that the secular education those schools provide goes hand-in-hand with the religious mission which is the only reason for the schools' existence."[203]

Direct Aid and the Public Relief Theory. Quoting from *Cook County v. Chicago Industrial School,* Justice Brennan stated: "The recurrent argument, consistently rejected in the past, has been that government grants to sectarian schools ought not be viewed as impermissible subsidies 'because [the schools] relieve the state of a burden which it would otherwise be itself required to bear . . . ' they will render a service to the state by performing for it its duty of educating the children of its people'."[204]

While agreeing that church-supported schools have noble purposes, Justice Brennan said that such considerations were not the issues. The point is that "in using sectarian institutions to further goals in secular education, the three statutes do violence to the principle that 'government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that non-religious means will not suffice.' "[205]

Direct Aid and the Secular Function of a Religious Body. Justice Douglas' opinion is particularly relevant. After reviewing the court's many caveats concerning financial support for religious activities, Douglas said:

> . . . in spite of this long and consistent history there are those who have the courage to announce that a state may nonetheless finance the *secular*

[202] Walz v. Tax Commission, 397 U.S. at 690-691 (1970).
[203] Lemon v. Kurtzman and DiCenso v. Robinson, 91 S. Ct. 2111 at 2133 (1971).
[204] Cook County v. Chicago Industrial School, 125 Ill. 540, 571, 18 N.E. 183, 197 (1888).
[205] Lemon v. Kurtzman and DiCenso v. Robinson, 91 S. Ct. 2111 at 2134 (1971).

part of a sectarian school's educational program. That, however, makes a grave constitutional decision turn merely on cost accounting and bookkeeping entries. A history class, a literature class, a science class in a parochial school is not a separate institute; it is part of the organic whole which the state subsidizes . . . What the taxpayers give for salaries of those who teach only the humanities or science without any trace of proselytizing enables the school to use all of its own funds for religious training. And sophisticated attempts to avoid the Constitution are just as invalid as simple-minded ones.[206]

Commenting on state regulations designed to ensure the secular use of tax funds, Justice Brennan evoked images of the Grand Inquisition in reverse: "The picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction surely raises more than an imagined spectre of governmental secularization of a creed."[207] On this same point, Justice Douglas said: "The curriculum presents subtle and difficult problems. The constitutional mandate can in part be carried out by censoring the curricula. What is palpably a sectarian course can be marked for deletion. But the problem only starts there. No matter what the curriculum offers, the question is, what is taught?"[208]

Justice Brennan acknowledged that the state has an undisputed interest in ensuring that all children receive a minimum level of secular education, but that "the state has no proper interest in prescribing the precise forum in which such skills and knowledge are learned."[209]

Johnson v. Sanders.

In this case a three-judge district court unanimously held Connecticut's Nonpublic School Secular Education Act to be in violation of the establishment clause of the First Amendment. This act would have paid 20 percent of the salaries of teachers of secular subjects in nonpublic schools.

Plaintiffs alleged that the law established a religion and that a discriminatory religious enrollment policy, tolerated by the act, violated their equal protection rights. The defendants contended that funds intended for purely secular activities could not be assumed to sustain the institution built around them. Moreover, the defendants insisted that failure by Connecticut to purchase secular activities from parochial schools constituted a violation of their free

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[206] *Ibid.*, p. 2125.
[207] *Ibid.*, p. 2130.
[208] *Ibid.*, p. 2122.
[209] *Ibid.*, p. 2132.

exercise rights. Their logic was also used by the defendants in *DiCenso:*

"[I]f the State allows the quality of parochial schools to drop, Catholics will have to place their children in a public school—even though it would violate their consciences to do so; therefore, their constitutional right to send their children to the school of their choice hinges upon whether or not the State financially sponsors their schools."

To the defendants' first claim, the court said that no purpose was served by an abstract discussion of the secular versus religious functions of the Catholic schools. The court insisted that the realities of school operation must be observed and stated:

> . . . a law which converts a school's entire task of providing secular instruction from a purely private to a predominately state responsibility, while permitting religious instruction to continue unaltered, would constitute sponsorship of the school—the physical and administrative facility through which religion is taught—even if all public funds were formerly designated to be spent for functions other than teaching religion.[210]

Responding to the second charge, the court reminded the defendants that the Constitution dictates no financial measure designed to sponsor parochial schools. The court quoted from *DiCenso:* "Certainly it would be anomalous if the First Amendment required the State to exclude religion from the public schools but at the same time to support an entire separate school system in order to facilitate the teaching of religion."[211]

The equal protection argument advanced by the plaintiffs did not long detain the court. Since neither of the plaintiffs could establish a nexus between their allegation and personal injury, the court ruled the plaintiffs had no legal standing to challenge the act on equal protection grounds.

As to First Amendment grounds, the court said the question to be settled was whether Connecticut's efforts to separate the secular from the religious in parochial schools, as required by the act, either advanced or inhibited religion. After reviewing administrative requirements of the act, the court decided the statute would either advance or inhibit religion, depending on how effectively the act's regulations were enforced.

> If the State purchases instruction but engages in only cursory investigation and policing of its nature, then its secularity cannot be assured and

210 Johnson v. Sanders, U.S. 319 F. Supp. 433 (Conn., 1970).
211 *Ibid.*, p. 435.

it is likely that religion also will be advanced by a transfer of a part of the State's revenue to support it. If officials do their jobs under the Act zealously, on the other hand, their broad intrusion into the administration of parochial schools will be certain to work changes restricting religion substantially . . . In either case, a law which sets up this inevitable, institutionalized conflict promotes the very evils which the First Amendment bars and cannot be termed primarily secular in effect.[212]

In summary, the court unanimously declared that the Connecticut act "violates the Establishment Clause of the First Amendment to the Constitution of the United States."[213] On June 30, 1971, the United States Supreme Court upheld the lower court's decision.

6. CONCLUSION

The verdict of history and of judicial opinion has not wavered in intent over the years: the use of public funds for religious schools is a violation of the First Amendment. Before our nation was founded, James Madison warned all citizens "to take alarm at the first experiment on our liberties."[214] The ink was hardly dry on the *Bill of Rights* before experiments, in one form or another, began. Heedful of Madison's warning, Thomas Jefferson properly took alarm and said that our First Amendment was intended to build "a wall of separation between Church and State."[215]

Throughout the years the Court has acted with single-mindedness in its determination to keep government out of church affairs and religion out of state affairs. In 1947 the Supreme Court said the First Amendment requires the state to be *neutral* in its relations with religion. Fifteen years later the Court insisted that legislation must *not advance nor inhibit religion.* Lately, governments were cautioned by the Supreme Court against *excessive entanglement* with religion.

Nothing has changed. Onslaughts against First Amendment religious clauses continue, and all are timelessly rebuffed. Only the most meager financial aids to religious schools, byproducts of general welfare legislation, have found favor in the Court.

The reason that nothing changes is eloquently simple. As long as the First Amendment remains, any law that allows financial sup-

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212*Ibid.*, pp. 432-433.
213*Ibid.*, p. 436.
214Gaillard Hunt (ed.), *The Writings of James Madison* (New York: G. P. Putnam's Sons, 1783), II, p. 185.
215Andrew A. Lipscomb and Albert E. Bergh, (eds.), *The Writings of Thomas Jefferson* (Washington, D. C.: The Thomas Jefferson Memorial Association, 1904), XVI, pp. 281-282.

port for religious schools must guarantee that funds will be put to secular use only, otherwise a religion might be established. But in order to make its guarantee good, the state must become excessively entangled in the affairs of religion—an insoluble paradox.

Nonetheless, there are no reasons to suspect that efforts by religious schools to draw on the public purse will be daunted by mere court decisions. History suggests quite the opposite. The first significant battle for parochial aid was waged by the Roman Catholic Church in New York City during the early 1840s. Since that time, though the schemes have varied—including "child-benefits," "sharing" public school facilities and personnel, "purchasing" contracts, student "loans," and tuition "reimbursements"—the arguments first articulated in 1840 remain unaltered.

Therefore, while one may expect religious schools to continue their seemingly eternal effort to acquire tax dollars, one may also expect the court to be equally vigilant to prevent such First Amendment assaults, no matter what form they take. As Justice Douglas has said, "What may not be done directly may not be done indirectly lest the Establishment Clause become a mockery."[216]

Implications

The financial plight of Roman Catholic schools at the elementary and secondary levels has highlighted the issue of nonpublic school aid laws. This subject has aroused considerable discussion in the field of education. However, informative discourse has been partly precluded by the lack of definitive information on the financial capacity of the Roman Catholic Church to support its own school system.

Roman Catholic schools are in financial difficulty. But the reasons for and the extent of that difficulty are questionable. There is need for a clear financial picture of each Catholic diocese, which *includes funds from parish and religious orders.* Recent studies have not been adequate, and confusion over Roman Catholic wealth and ability to finance parochial schools continues.

Similarly, there has been little reliable information available on existing nonpublic school aid laws at the state and federal levels. Roman Catholic Church leaders have balked at publicizing financial statements. Moreover, paucity of data on the allocation of public funds already available to nonpublic schools has made it impossible for interested persons to become informed.

[216]Abington School District v. Schempp, 374 U.S. 203 at 229-230 (1963).

The citizen, however questioning, is left with only two ill-defined alternatives: (1) approval of tax support for religious schools, or (2) consent to an increased tax bill for education of Roman Catholic youth in the public school system as parochial schools are forced to close because of lack of funds.

Findings from an exhaustive research into this area of public education reveal that tax funds are already flowing to religious schools from national as well as state levels.[217] As pressures on state and federal legislators mount, the rate and amount of this flow may be expected to increase. The only foreseeable barrier would be an inclusive ruling by the United States Supreme Court, prohibiting parochial aid in any form. The likelihood of such a decision, however, appears to be minimal as one studies and analyzes recent Supreme Court decisions.

The National Catholic Educational Association revealed in 1970 that fourteen states accounted for 79 percent of the 4,688,059 students enrolled in the nation's Catholic schools.[218] These states in ranked order are New York, Pennsylvania, Illinois, Ohio, California, New Jersey, Michigan, Massachusetts, Wisconsin, Mississippi, Louisiana, Minnesota, Indiana, and Maryland. These same states account for 51 percent of the state laws that assist religious schools.

The number of federal laws that assist nonpublic schools is only about one-ninth of the total of state laws. Nevertheless, federal laws have the capacity to release massive tax assistance to religious schools.

Since 1965, the Elementary and Secondary Education Act, new educational laws, and amending acts to old laws have provided parochial schools with millions of federal tax dollars.

Evidence of continuing federal interest in parochial aid laws is readily found. For example, in 1970 the Office of Economic Opportunity granted over $500,000 to Harvard University's Center for the Study of Public Policy to study the feasibility of the voucher plan.[219] Under the voucher plan, parents would use tax money drawn from federal, state, and local sources to send their children to public, private, or parochial schools. Other federal grants for

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[217]Michael R. Smith, *The Legality of Using Public Funds for Religious Schools as Interpreted by Federal Court Decisions,* unpublished doctoral dissertation. School of Education, The University of North Carolina at Greensboro, Greensboro, North Carolina, April 1971.

[218]National Catholic Educational Association, "A Statistical Report on Catholic Elementary and Secondary Schools for the Years 1967-68 to 1969-70," Washington, D. C.: 1970.

[219]"Voucher Battle Heats Up," *Church & State,* 23 (November 1970), p. 6.

feasibility studies for the voucher plan have been made to school districts in Gary, Indiana, Seattle, Washington, and San Jose, California.[220]

According to the *New York Times*, between 1965 and 1970 federal assistance to religious schools totaled $250 million.[221] Reliable estimates of the annual dollar flow from both federal and state levels are nonexistent. However, a rough estimate of money released to Roman Catholic schools may be derived from the National Catholic Educational Association's own statistics.[222] That association has reported that Roman Catholic school income for 1969-70 was $1,364,000,000. The source of all income except for $149,000,000 was accounted for; that amount was labeled as having come from "other" sources. If one assumes that "other" means federal and state tax aid, then taxpayers are already paying for 11 percent of the education of Catholic youth. Many writers have suggested that 11 percent is an unrealistically low percentage.

Because Roman Catholic students comprise the great majority of the total nonpublic enrollment, authorities argue that the lion's share of funds released to nonpublic schools goes to Catholic schools. For example, of the recent $10.1 million released by New York to nonpublic schools, approximately 90 percent went to Roman Catholic schools.

It is impossible to estimate reliably the present cost to taxpayers due to state parochial aid laws, but many millions of dollars must be flowing. Consider only one form of parochial aid—shared-time. Shared-time programs are generally explained as programs under which parochial students take part of their course work in public schools. The Department of Health, Education, and Welfare estimated as early as 1965 that more than 63,000 parochial school students were enrolled in shared-time programs.[223] The cost of a shared-time program in a particular state may be estimated by multiplying the number of shared-time students, first by the percentage of time that parochial students spend in public schools, and second, by the per-pupil expense in that state. The courses in which parochial students generally enroll are those requiring expensive equipment, such as chemistry, vocational, and physical education.

220"Vouchers: OEO Just Won't Quit," *Church & State*, 24 (May 1971), p. 6.
221*New York Times*, October 17, 1970.
222National Catholic Educational Association, "A Statistical Report on Catholic Elementary and Secondary Schools for the Years 1967-68 to 1969-70," Washington, D. C.: 1970.
223"Shared Time Spreading," *Church & State*, 23 (November 1970), p. 13.

A 1970 study of state legislative action conducted by the American Jewish Congress provides further insight into the magnitude of parochial funds.[224] That study, which reported on twenty-one state legislatures, revealed that in 1970 seven states passed into law bills appropriating $93,205,000 for the support of nonpublic schools. Laws responsible for $32,005,000 of that amount have since been declared unconstitutional by either state or federal courts. Purchase-of-service laws were declared unconstitutional in Connecticut, Rhode Island, and Louisiana. In addition, all parochial aid laws, except for pupil transportation, have been nullified by a constitutional amendment approved by Michigan voters.

Projections

Normally predictions are hazardous, but trends in the historical quest for parochial aid eliminate much of the uncertainty. One might expect efforts for parochial aid to continue in states heavily populated with Catholics, where the political pressure is greatest. For example, since the *Lemon* decision in June 1971, Pennsylvania replaced its purchase-of-services act with a tuition reimbursement law. Incidentally, that statute is being challenged in a new suit, *Lemon v. Sloan.* Ohio has enacted a new $61 million tuition grant program. Moreover, New York enacted, and had declared unconstitutional, a teacher's salary act similar to the issues in *Lemon.* Since the January 10, 1972, United States district court ruling against New York's teacher salary law, efforts in the New York state legislature have been directed toward the passage of a $70 million aid-through-parents program.

Many states are now looking closely at the possibility of linking aid to students or parents under the double-pronged assumption that the parent and/or student is the beneficiary rather than religion, and that this form of aid has already been found constitutional in the form of "G.I. Bill" assistance. This approach, of course, conveniently overlooks at least two interesting points: (1) that the church is nonetheless relieved of a financial burden it would otherwise have to carry, regardless of the avenue through which the relief is supplied; and (2) that G.I. Bill educational assistance is a form of compensation for services previously rendered by soldiers, whereas aid to students or parents is gratuitous.

A second fairly safe prediction is that the federal government will attempt to rescue financially debilitated parochial schools. No de-

[224] American Jewish Congress, Commission on Law and Social Action, "Public Aid to Religiously Affiliated Schools—The Record of the State Legislatures in 1970," March 1971.

cision on federal aid to church-related elementary and secondary schools has ever been rendered by the United States Supreme Court, whereas forms of state aid have been consistently thwarted by the court. Also, parochial schools appear to have a powerful federal ally. President Nixon, in a speech given in New York City on August 17, 1971, assured Roman Catholic leaders he would do everything he could to find a constitutional means of financially aiding parochial schools. On November 18, 1971, the president reiterated his support.[225]

A federal attempt to aid parochial schools is almost a certainty. Some believe that assistance will come in the form of a tax rebate to parents of private school children. That, as a matter of fact, is the type of aid currently being sought by Catholic bishops.[226] Others suggest aid will come in the form of a voucher program.

There is reason to believe that a date for release of federal parochial aid is near. In view of recent court decisions against the use of locally collected property taxes as a means of financing school operations, pressures are mounting for educational financial reforms. Many feel that new federal proposals for school support will include provisions for parochial assistance, but that those provisions will be buried in the vastness and complexity of the act. Certainly, congressional representatives from states heavily populated with Catholics cannot be expected to vote for a new educational act that excludes aid to church-related schools. That is a lesson already well learned, since only by including such aid was President Johnson able to secure passage of the Elementary and Secondary Education Act of 1965.

A final prediction is that the drive for parochial aid will eventually subside in the wake of additional court decisions and parental disenchantment with religious schools. Roman Catholic schools, which account for nearly 85 percent of all church-related schools, have decreased in enrollment from a 1965-66 high of 5.5 million students to 4 million in 1971-72.[227] Furthermore, even Catholic spokesmen are beginning to recognize that the declining enrollment is not a result of inadequate public aid but stems directly from changing preferences among Catholic parents.

As 1971 drew toward a close, President Nixon's Commission on School Finance warned that Catholic school survival depended not

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225 *New York Times*, November 18, 1971, p. 25.
226 *New York Times*, December 1971, p. 13.
227 "Parochial Slide Continues," *Church & State*, 24 (December 1971), p. 21.

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so much on obtaining federal aid as on making internal reforms sufficient to gratify a growing number of dissatisfied Catholic parents.[228] Early in 1972, in Seattle, Washington, the Reverend C. Albert Koob, president of the National Catholic Educational Association, told Catholic school principals, "Our most serious problem is that our own people are not supporting Catholic schools."[229]

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[228] *New York Times*, December 1971, p. 13.
[229] "Parochial Problems Not Financial: Koob," *Church & State*, 25 (March 1972), p. 15.

APPENDIX A

FEDERAL PROVISIONS

First Amendment, U.S. Constitution.
Fourteenth Amendment, U.S. Constitution.

STATE PROVISIONS

Alabama—(Code of Alabama, Volume 1)
Declaration of Rights—Article I, Section 3.
Education—Article XIV, Section 263.
Alaska—(Alaska Statutes—1962)
Declaration of Rights (Freedom of Religion)—Article I, Section 4.
Health, Education, and Welfare (Public Education)—Article VII, Section 1.
Arizona—(Arizona Revised Statutes Annotated, Volume 1)
Declaration of Rights—Article II, Section 12.
Public Debt, Revenue, and Taxation—Article IX, Section 10.
Education—Article XI, Section 7.
Ordinance—Article XX, Section 1, 7.
Arkansas—(Arkansas Statutes Annotated—1947, Volume 1)
Declaration of Rights—Article II, Sections 24, 25, 26.
Education—Article XIV, Sections 1, 2.
California—(Constitution of the State of California Annotated—1952, Volumes 1, 2)
Declaration of Rights (Liberty of Conscience)—Article I, Section 4.
Legislative Department (Public Aid for Sectarian Purposes Prohibited)—Article IV, Section 30.
Education (No Public Money for Sectarian Schools)—Article IX, Section 8.
Colorado—(Colorado Revised Statutes—1953, Volume 1)
Bill of Rights—Article II, Section 4.
Legislative Department—Article V, Section 34.
Education—Article IX, Sections 7, 8.
Connecticut—(General Statutes of Connecticut Revised—1966, Volume 1)
Declaration of Rights—Article First, Section 3.
Of Religion—Article VII.
Of Education—Article VIII, Section 4.
Delaware—(Delaware Code Annotated, Volume 1)
Bill of Rights (1. Freedom of Religion)—Article I, Section 1.
Education (3. Use of educational funds by religious schools)—Article X, Section 3 (4. Use of public school fund)—Article X, Sections 4, 5.
Florida—(Florida Statutes Annotated Revised—1968, Volumes 25A, 26A)
Freedom of Religion—Article I, Section 3.
Funds for Public Schools—Article IX, Section 6.
Georgia—(Code of Georgia Annotated, Book 1, Supplement)
Bill of Rights—Article I, Paragraphs XII, XIII, XIV.
Hawaii—(Hawaii Revised Statutes)
Bill of Rights (Freedom of Religion, Speech, Press, Assembly and Petition)—Article I, Section 3.
Taxation and Finance (Appropriations for Private Purposes Prohibited)—Article VI, Section 6.
Education (Public Education)—Article IX, Section 1.

Idaho—(Idaho Code, Volume 1)
Declaration of Rights—Article I, Section 4.
Education and School Lands—Article IX, Sections 5, 6.
Illinois—(Illinois Annotated Statutes)
Bill of Rights (Inherent and Inalienable Rights-Religious Freedom)—Article II, Section 3.
Education (Free Schools)—Article VIII, Sections 1, 3.
Indiana—(Burns Indiana Statutes, Volume I)
Bill of Rights—Article I, Sections 2 through 7.
Education—Article 8, Section 3.
Iowa—(Iowa Code Annotated, Volume 1)
Bill of Rights—Article I, Sections 3, 4.
Kansas—(Kansas Statutes Annotated, Constitutions Volume)
Bill of Rights (Religious Liberty)—Section 7.
Education—Article VI, Section 6(c).
Kentucky—(Kentucky Revised Statutes, Volume 1)
Bill of Rights—Sections 1,5.
Education—Section 157.330(2).
Louisiana—(West's Louisiana Statutes Annotated, Volumes 1, 2, 3)
Bill of Rights (4. Freedom of Religion)—Section 4.
Public Funds—Article IV, Section 8.
No appropriation of public funds for private or sectarian schools—Article XII, Section 13.
Civil service system; state; cities—Article XIV, Section 15 (A) (1).
Maine—(Maine Revised Statutes Annotated, Volume 1)
Declaration of Rights (Religious Freedom)—Article I, Section 3.
Oaths and subscriptions—Article IX, Section 1.
Maryland—(Annotated Code of Maryland, Volume 9A)
Declaration of Rights—Articles 36, 37, 38, 39.
School Fund—Article VIII, Section 3.
Massachusetts—(Annotated Laws of Massachusetts, Volume 2B)
Declaration of Rights—Article II.
Religious freedom established—Article XI.
No law to prohibit free exercise of religion—Article XLVI, Sections 1, 2.
No measure that relates to religion—Article XLVIII, Section 2.
Michigan—(Michigan Statutes Annotated, Volume 1)
Declaration of Rights—Article I, Sections 1, 4.
Education—Article VIII, Section 2.
Finance and Taxation (school aid fund)—Article IX, Section 11.
Minnesota—(Minnesota Statutes Annotated, Volume 1)
Bill of Rights—Article I, Sections 16, 17.
School Funds (Prohibition as to aiding sectarian school)—Article VIII, Section 3.
Mississippi—(Mississippi Code Annotated—1942, Volume 1)
Religious tests—Article III, Section 18.
No religious schools entitled to public funds—Article VIII, Section 208.
Missouri—(Missouri Revised Statutes—1949, Volume 1)
Bill of Rights—Article I, Sections 1, 6, 7.
Education—Article IX, Section 8.

Montana—(Revised Code of Montana—1947, Volume 1)
Declaration of Rights—Article III, Section 4.
No appropriations for sectarian organizations—Article V, Section 35.
Education—Article XI, Sections 8, 9.
Nebraska—(Revised Code of Nebraska—1943, Volume 2)
Bill of Rights—Article I, Section 4.
Education—Article VII, Section 11.
Nevada—(Nevada Revised Statutes, Volume 5)
Declaration of Rights—Article I, Section 4.
Education—Article XI, Sections 2, 9, 10.
New Hampshire—(New Hampshire Revised Statutes Annotated—1955, Volume 1)
Bill of Rights—Articles 5th, 6th.
No public funds for religious sects—Article 83.
New Jersey—(New Jersey Statutes Annotated, Constitution Volume)
Rights and Privileges—Article I, Sections 3, 4, 5.
Taxation and Finance—Article VIII, Section IV.
New Mexico—(New Mexico Statutes—1953, Volume 1)
Bill of Rights—Article II, Section 11.
No public funds for sectarian institutions—Article IV, Section 31.
Education—Article XII, Sections 3, 9.
Compact with the United States—Article XXI, Section 4.
New York—(New York Statutes—Annotations—Forms, Volume 12)
Bill of Rights—Article I, Section 3.
State Finances—Article VII, Section 8.
Education—Article XI, Section 3.
North Carolina—(General Statutes of North Carolina, Volume 4A)
Declaration of Rights—Article I, Section 26.
Education—Article IX, Sections 1, 4, 12.
North Dakota—(North Dakota Century Code Annotated, Volume 3)
Declaration of Rights—Article I, Section 4.
Education—Article VIII, Sections 147, 152.
Compact with the United States—Article XVI, Section 203.
Ohio—(Ohio Revised Code)
Bill of Rights—Article I, Section 7.
Education—Article VI, Section 2.
Oklahoma—(Oklahoma Statutes Annotated, Constitution Volume for Articles I-IV)
Federal Relations (Religious Liberty; Public Schools)—Article I, Sections 2, 5.
Bill of Rights (Public money or property)—Article II, Section 5.
Oregon—(Oregon Revised Statutes, Volume 5)
Bill of Rights, Article I, Sections 2-6.
Pennsylvania—(Purdon's Pennsylvania Statutes Annotated, Constitution Volumes)
Declaration of Rights—Article I, Sections 3, 4.
Legislation—Article III, Sections 15, 29, 30.
Rhode Island—(General Laws of Rhode Island—1956, Volume 1)
Declaration of Rights—Article I, Section 3.
Of Education—Article XII, Sections 2, 4.

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South Carolina—(Code of Laws of South Carolina, Volume 16)
Declaration of Rights—Article I, Section 4.
Education—Article XI, Sections 9, 11.
South Dakota—(South Dakota Code of 1939, Volume 2)
Bill of Rights—Article VI, Section 3.
Educational School Lands—Article VIII, Section 16.
Compact with the United States—Article XXII, Section Fourth.
Tennessee—(Tennessee Code Annotated, Volume 1)
Declaration of Rights—Sections 3, 4.
Miscellaneous Provisions—Section 12.
Texas—(Vernon's Constitution of the State of Texas Annotated, Volume 1, 2)
Bill of Rights—Article I, Sections 4, 5, 6, 7.
Education—Article VII, Section 5.
Taxes for Public Purposes Only—Article VIII, Section 3.
Utah—(Utah Code Annotated—1953, Volume 1)
Declaration of Rights—Article I, Sections 1, 4.
Free, nonsectarian schools—Article III, Section Fourth.
Education—Article X, Sections 1, 12, 13.
Vermont—(Vermont Statutes Annotated, Volume 1)
Declaration of Rights—Chapter I, Article III.
Laws to encourage . . . schools—Chapter II, Section 64.
Virginia—(Code of Virginia—1950, Volume 9)
Bill of Rights—Article I, Section 16.
Legislative Department—Article IV, Section 58.
Education and Public Instruction—Article IX, Section 141.
Washington—(Revised Code of Washington, Volume 0)
Declaration of Rights—Article I, Section 11.
Education—Article IX, Sections 2, 4.
West Virginia—(West Virginia Code, Volume 1)
Bill of Rights—Article III, Section 15.

APPENDIX B

CODES FOR FEDERAL AND STATE PROVISIONS PERMITTING THE USE OF PUBLIC FUNDS FOR RELIGIOUS SCHOOLS

FEDERAL LAWS

National School Lunch Act of 1946—Public Law (P. L.) 79-396, and amendment P. L. 87-823.
Federal Property and Administration Services Act of 1949—P. L. 81-152.
Agriculture Act of 1954—P. L. 83-690, and amendment P. L. 91-295.
National Defense Education Act of 1958—P. L. 85-864, and amendment P. L. 88-865.
Economic Opportunity Act of 1964—P. L. 88-452, and amendment P. L. 89-794.
Elementary and Secondary Education Act of 1965—P. L. 89-10.
Higher Education Act of 1965—P. L. 89-329.
Veteran's Readjustment Benefits Act of 1966—P. L. 89-358.
Child Nutrition Act of 1966—P. L. 89-642.

STATE LAWS

(For laws enacted after July 1, 1971, no codes appear; they are identified by an asterisk.)

Alabama, Alaska, Arizona, Arkansas—none.

California

Transportation—West's Annotated California Code, Education Code, Division 13, Section 16806 .
Textbooks—WACC, Division 8, Section 9653.
Driver Education—WACC, Section 18251.2.
Lunches—WACC, Division 2, Sections 451, 452, 453.

Colorado

Transportation—Colorado Revised Statutes, 1953, Chapters 106 to 137, Sections 123-10-43, and 123-10-44.
Shared Time—CRA, 1963, Volume 9, Sections 123-30-10 (31), and 123-30-10 (32).

Connecticut

Transportation—General Statutes of Connecticut, Volume 11, Section 10-281.
Driver Education—Public Acts—Connecticut—1967, Act 668-67.
Health Services—PA—C—1968, Act 481-68.
Services for Educationally Deprived Children—PA—C—1967, Act 506-67.
Purchase of Secular Services (certain nonpublic teachers' salaries, and textbooks)—PA—C—1969, Act 791-69.

Delaware

Transportation—Delaware Code Annotated, Titles 12-14, Section 2905.
Driver Education—DCA, Titles 12-14, Section 131.

Florida, Georgia—none.

Hawaii

Driver Education—Hawaii Revised Statutes, Volume 4, Section 299-1.
Tax Credits—HRS, Volume 3, Section 235-57.

Idaho

**Transportation*

Illinois

Transportation—Smith-Hurd Illinois Annotated Statutes, School Code, Chapter 122, Section 29-5.
Lunches—S-H IAS, Chapter 122, Sections 712.1, 712.2, 712.3, 712.4, 712.5, and 712.8.
Driver Education—S-H IAS, Chapter 122, Sections 27-24.2, 27-24.3, and 27-24.4.
Shared Time—S-H IAS, Chapter 122, Section 18-8.

Indiana

Transportation—Acts 1965, Indiana, 94th Session, Chapter 260, Article IX, Section 901.
Textbooks—Burns Indiana Statutes Annotated, Volume 6, Section 28-512.

Iowa

Shared Time & Sharing Instructors—Iowa Code Annotated, Volume 12, Section 257.26.
Auxiliary Services (Health, Driver Education, etc)—Acts Second Regular Session, (63 G. A.), Chapter 1110.

Kansas

Transportation—Kansas Statutes Annotated, Volume 5, Section 72-8306.

Health Services (limited to hearing testing)—KSA, Volume 5, Sections 72-1204, 72-1206, and 72-1207.

Kentucky

Transportation—(permissive legislation as determined by OAG 65-383)—Kentucky Revised Statutes, Volume II, Section 158.115.

Shared Time—(permissive legislation as determined by OAG 68-423)—KRS, Volume II, Sections 158.030, and 159.030.

Louisiana

Transportation—Louisiana Revised Statutes, Volume 13, Section 17-158.

Textbooks—LRS, Volume 13, Section 17-351.

Lunches—LRS, Volume 13, Section 17-19-1.

Purchase of Secular Services (certain nonpublic teachers' salaries)— *Overturned by the state supreme court, but now on appeal to the U. S. Supreme Court—Laws of Louisiana, 1968, Act 223.

Maine

Transportation—Maine Revised Statutes Annotated, Volume 14, Section 5104.

Maryland

Transportation—(13 of the 24 school systems have enabling legislation)—Anne Arundel County, Laws of Maryland 1963, Chapter 854.
Allegany County, LOM 1933, Chapter 399.
Baltimore County, LOM 1961, Chapter 525.
Calvert County, LOM, Extra Session 1948, Chapter 11.
Cecil County, LOM 1957, Chapter 70.
Charles County, LOM 1947, Chapter 918, Section 241A.
Harford County, LOM 1955, Chapter 112.
Howard County, LOM 1943, Chapter 648, Section 291A.
Montgomery County, LOM 1945, Chapter 977.
Prince George's County, LOM 1947, Chapter 910.
St. Mary's County, LOM 1941, Chapter 609, Section 202.
Talbot County, LOM 1955, Chapter 403.
Washington County, LOM 1970, Article 77, Section 146A.

Shared Time—Annotated Code of Maryland—1969 Replacement Volume—Article 77, Section 41A.

Tuition Voucher Plan—ACM—1969 Replacement Volume—Article 77, Sections 213 to 220.

Massachusetts

Transportation—Annotated Laws of Massachusetts, Volume 2B, Chapter 76, Section 1.

Michigan (all forms of parochial aid other than transportation were prohibited via referendum).

Transportation—Michigan Statutes Annotated, Volume 11, Sections 15.3366, 15.3590 (1) 15.3590 (2) 15.3591, and 15.3592.

Minnesota

Transportation—Minnesota Statutes Annotated 1946, Volume 10, Supplement, Sections 123.76, 123.77, 123.78, and 123.79.

Driver Education—MSA 1946, Supp., Volume 12-A, Section 171.04.

Shared Time—MSA 1946, Supp., Section 124.17.

Mississippi

Textbooks—Mississippi Code 1942 Annotated, Volume 5, Section 6646.

Driver Education—MC 1942, Volume 5, Supp., Sections 6232-72, to 6232-80.

Forgivable Student Loans—General Laws of Mississippi 1969, Extraordinary Session, Chapter 27.

Health Services—MC 1942, Volume 5, Section 6667.

Missouri

Lunches—Vernon's Annotated Missouri Statutes, Volume II, Section 167.201.

Montana

Transportation—Revised Code of Montana 1947 Annotated, Volume 4, Section 75-3408.

Nebraska

**Textbooks*

Nevada—none.

New Hampshire

Transportation—New Hampshire Revised Statutes Annotated 1964, Volume 2-A, Section 189.9.

Shared Time—NHRSA 1964, Supp., Volume 2-A, Sections 193:1a, and 198:21.

Driver Education—NHRSA 1964, Volume 2-A, Section 262:1a.

Health and other services—NHRSA 1964, Supp., Volume 2-A, Sections 189:49, and 198:22.

New Jersey

Transportation—New Jersey Statutes Annotated, Volume 18-A, Section 18A:39-1.

Aid to Handicapped—NJSA, Volume 18A, Section 18A:46-13.

Purchase of Secular Services (certain nonpublic teachers' salaries, and textbooks)—NJSA, Volume 18A, Section 18A:58-38 (supplement).

New Mexico—none.

New York

Transportation—McKinney's Consolidated Laws of New York Annotated 1970, Book 16, Section 3635.

Textbooks—MCL of NYA 1970, Book 16, Section 701.

Health Services—MCL of NYA 1970, Book 16, Section 912.

Funds for record keeping—Laws of New York, 1970, Chapter 138.

**Purchase of Secular Services*

North Carolina—none.

North Dakota

Transportation—North Dakota Century Code Annotated, Volume 3, Section 15-34-28.

Ohio

Transportation—Page's Ohio Revised Code Annotated, Titles 31, 33, 35, Section 3327.01.

Auxiliary Services (includes authorization and funds for driver education, certain nonpublic teachers' salaries, and various other pupil services)—PORCA, Section 3317.06.

Purchase of vocational educational services from private sources—PORCA, Section 3313.91.

Oklahoma—none.

Oregon
Transportation—Oregon Revised Statutes, Volume 3, Section 332.415.
Lunches—ORS, Section 327.520.
Driver Education—ORS, Section 343.730.
Pennsylvania
Transportation—Purdon's Pennsylvania Statutes Annotated, Volume 24, Section 13-1361.
Purchase of Secular Services (certain nonpublic teachers' salaries, and textbooks)—Public Acts of Pennsylvania, 1968, Public Law 109.
Shared Time—PPSA, Volume 24, Section 5-502.
Driver Education—PPSA, Volume 24, Section 15-1519.1.
Lunches—PPSA, Volume 24, Section 13-1337.
Rhode Island
Transportation—General Laws of Rhode Island 1956, Volume 3A, Section 16-21-2.
Textbooks—GL of RI 1956, Volume 3A, Section 16-23-2.
Lunches—GL of RI 1956, Volume 3A, Sections 16-8-7, 16-8-8, 16-8-9, and 16-8-10.
Shared Time—GL of RI 1956, Volume 3A, Section 16-7-22.
Purchase of Secular Services (certain nonpublic teachers' salaries) *Declared unconstitutional by a Federal District Court, but on appeal to U.S. Supreme Court—GL of RI 1956, Volume 3A, Sections 16-51-1 through 16-51-9.
South Carolina—none.
South Dakota
Driver Education—South Dakota Compiled Laws 1967, Volume 10, Section 32-5-50.
Tennessee, Texas—none.
Utah
Driver Education—Utah Code Annotated 1953, Volume 5B, Section 53-14-13.5.
Vermont
Driver Education—Vermont Statutes Annotated, Volume 5, Section 1045.
Tuition payments—VSA, Sections 823 through 827.
Auxiliary Services—VSA Sections 3441(1), 3441(2), 3445, 3471(3), 3471(4).
Virginia—none.
Washington
Shared Time—Laws of Washington, 1969, First Extra Session, Chapter 217.
West Virginia
Transportation—West Virginia Code, Chapters 18, 19, Section 18-5-13.
Textbooks—WVC, Chapters 18, 19, Section 18-5-21b.
Wisconsin
Transportation—West's Wisconsin Statutes Annotated, Volume 5, Section 40.53.
Driver Education—Laws of Wisconsin 1969, Chapter 55, Section 79, 121.15.
Wyoming—none.
NOTICE: At the time these laws were researched, some were not yet printed in the regular codes, and others were in the supplements. The laws found in the codes or supplements to the codes are indicated by the words *Code, Statutes,* or *Compiled Laws,* for example, West's Annotated California Code.

Laws not found in the codes or supplements will be found in the session laws; these laws are indicated by the absence of the words *Code*, *Statutes*, or *Compiled Laws*, for example, Laws of Washington, 1969, First Extra Session, Chapter 217.

DEFINITION OF TERMS

Child-benefit theory maintains that the benefit of state aid is intended for the child and that any simultaneous benefit accruing to a religious institution is incidental.

Contract theory proposes that a legislature may contract to purchase secular educational services from nonpublic (including parochial) schools, since these services would otherwise have to be provided by the legislature to fulfill its constitutional duty of providing education for the people of the state.

General welfare theory derives from the fact that Congress is constitutionally charged with maintaining the welfare of all citizens; aid may be extended under this theory even though it incidentally aids a sectarian institution.

Parity means that religious schools seek aid of the same magnitude as states grant to public schools.

Parochial school is one controlled directly by the local church, parish, or diocese.

Public funds refer to either federal or state revenues.

Religious school may also mean parochial school but is not necessarily tied to a local church, parish, or diocese.

Court, when capitalized, denotes the United States Supreme Court.

Writ of certiorari (Latin for "to be informed of something") is an order from a higher court to a lower court, requesting that the entire record of a case be sent up for review by the higher court.

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....., *1970.* Article 77.
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